Mechanisms for the Governmental Review of Professional Legislation

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for
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An Internal Working Document

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PREFACE

> Public knowledge of governmental activities is the basis of all control of delegated legislation. For parliamentary democracy is a system of government which requires that the executive be responsible to the legislature and that both be accountable to the people, and there can be neither responsibility nor accountability where there is no knowledge of what has been done. In political matters, knowledge is the beginning of power, and its lack, impotence. There should be, as a general rule, public knowledge of the processes of delegated legislation before, during, and after the making of regulations, and any derogation by government from this rule requires justification.
>
> (Canada, House of Commons, Special Committee on Statutory Instruments, 3rd Report, Ottawa: Queen's Printer, 1969)

This paper has been prepared for the Professional Organizations Committee as an aid to the consideration of governmental review of professional legislation. Three general mechanisms are examined in the light of their applicability to the professions under study by the Committee: (1) sunset laws; (2) standing and select committees; and (3) advisory bodies. While the first two models involve participation by the legislative branch of government, the latter is lodged at the executive level, with membership often drawn from outside the government mainstream.

The methodology used here is straightforward: it is to outline three approaches to governmental overview of delegated responsibility which represent points on a spectrum, not only in the degree of such overview, but also with respect to its style. These mechanisms are then analyzed in terms of their suitability to the professional legislation before the Professional Organizations Committee.

Likewise, the intent of this paper is a simple one: it seeks ways of improving the public accountability of professional legislation. This can be achieved through a balanced input of professional and public interests,

but must strive to do so without the encumbrances of unnecessary layers of government bureaucracy. This goal, it is suggested, would serve to strengthen, rather than weaken, the structures of professional self-government which exist today.

I. LEGISLATIVE REVIEW

Like any new idea whose time has come, Sunset legislation has washed the American frontier as completely (though not as solemnly) as its namesake. Sunset laws have virtually swept that nation since the state of Colorado enacted the first such act in mid-1976. Since then, virtually every state has considered the proposal and twenty-nine in total have adopted Sunset legislation.[1] Similar action is underway at the federal level where Democratic and Republican senators are co-sponsoring Sunset bills and navigating them through the Senate Governmental Affairs Committee.

Sunset can be defined as an action-forcing mechanism designed to increase executive accountability and legislative evaluation of programmes and agencies.

> Every government program should periodically terminate and continue only after an evaluation and a legislative vote to re-establish it. The objective is to replace the assumption that every program automatically continues unless there is a vote to terminate it with the assumption that every program automatically terminates unless there is a vote to continue it.[2]

This section will examine the Sunset experience from the very short perspective of a review mechanism that is, after all, only two years old. The literature does indicate that lessons are being learned already, such that "Sunset" is becoming less the amorphous, romantic notion of spirited lobbyists and newly-cleansed politicians; rather, it is developing into a serious and demanding commitment on the part of all participants.

Sunset legislation was the brainchild of one Craig Barnes, a lawyer for the Colorado Chapter of Common Cause, an active U.S. lobby group. The Colorado chapter developed a bill for periodic termination of forty-three state regulatory agencies, boards and commissions and got a diverse cast of legislators to enact it. Colorado, having undergone the first Sunset reviews of thirteen regulatory agencies in 1977, is perhaps the best state to look at closely in assessing the Sunset mechanism. Indeed, many states have followed the Colorado example by making their Sunset acts applicable only to regulatory agencies.

Other states, especially those in the south, have taken a comprehensive approach to Sunset. Unfortunately, this has been coupled with an objective to decide on the fate of all government programmes and regulatory agencies, sometimes at one sitting of the legislature! These are the so-called "high-noon" brand of Sunset laws. They often offer a distinct departure from most Sunset statutes: whereas, in most such laws, an agency is terminated unless the legislature votes to continue it, in the Alabama "high-noon" law, for example, an agency continues unless both houses vote to abolish it. This posits some immediate implications on the Sunset procedures, not the least of which is the increased opportunities for successful lobbying. In Alabama, in 1977, 207 agencies, including junior colleges, and trade schools, were railroaded through the House of Representatives for continuation or termination in a three-hour session. In 1978, 278 programmes were reviewed in ten days. Legislators left themselves no intermediate alternatives (eg. re-organization). Choices were made after recommendations from an eleven-member Sunset committee were submitted to the House. This committee held hearings, gathered information from the programmes and agencies under review and

conducted zero-based budget reviews in preparation for its advice to the House. As a result of the "high-noon" session, the Legislature voted to discontinue nineteen programmes; eventually, however, only one agency, the Commission on Intergovernmental Cooperation, died. The others secured a stay of execution by adopting such tactics as those employed by the supporters of the Department of Youth Services, a youth correctional agency. In learning of their forced demise they asked the Attorney General for his opinion. He decided that only those agencies which the law named for termination in 1977 could be cut that year. The fuzziness of this stated rationale notwithstanding, it is important to note that the comprehensive Sunset laws seem so far to have opted for the rubber stamp under the guise of rigour.

The evidence mounting as to the necessary steps for effective Sunset review would suggest a slower and more modest approach. This would favour legislation covering either regulatory agencies or a selection of regulatory agencies and government programmes.

That is not to say that even the southern versions of Sunset are without merit. Observers of the Alabama experience report that the process has forced legislators to take a better and closer look at how the government is spending its money.

While chief promulgators of Sunset are quick to point out that even the most conservative Sunset laws are not a panacea for what aches our prolific governments, they stress the attraction on some compelling grounds. As noted above, the Sunset process provides decision-makers with an important budgetary tool by which allocations are scrutinized in the broader context of agency goals and the achievement of same. In this aspect, a Sunset law operates much the same as zero-based budgeting.

Most Sunset legislation requires that a performance audit be conducted at the same time as the more comprehensive evaluation reports are being prepared. Both should be prepared by "appropriate" executive agency staff and submitted jointly to the "appropriate" legislative committees. Discussion of what is deemed "appropriate" in both instances will follow.

Sunset, then, has an appeal to those who are disgruntled with the incremental, non-evaluative manner of funding programmes and agencies. Another source of attraction is the increasing dismay over the growth in the numbers of uncontrollable and permanent programmes in government which are given unlimited or at least unmonitored funds. Such is the fertility of governments to create programmes, boards, commissions and the like, that duplication and conflicts abound. "Old agencies never die, they don't even fade away."[3]

The Sunset mechanism holds out the promise of rationalizing this chaos in an orderly way; introducing the possibility of termination has an impressive effect on ensuring meaningful programme evaluation. "By shifting the burden of proof from those who would terminate a program to those who would renew it, the advocates of Sunset laws hope to create an incentive for individual agencies, and the government as a whole to improve performance."[4] It remains to be seen whether that incentive becomes a manipulative one in the former arena or simply dies on the vine in the latter. For now, Sunset holds the promise of being an action-forcing mechanism and the best action it is forcing is a sense of discipline to the review process.

To be fair, the concept of Sunset is not unique; it is simply one that has at long last been discovered. The story is told that, when former Justice William O. Douglas was Chairman of the Securities and Exchange Commission,

he proposed to President Roosevelt to abolish every agency every ten years. He warned that to do otherwise would risk that agencies become captives of the very industries they were established to regulate. "Roosevelt would always roar with delight at that and of course never did anything about it."[5] In 1969, Professor Theodore J. Lowi suggested a 'tenure of statutes act' to limit the life of every organic act every five to ten years in order to evaluate them. Some more recent precursors to Sunset include the federal Advisory Committee Act of 1972 wherein it is stated that each advisory body should be terminated every two years unless renewed by the President or another executive officer who established the committee.[6] During its first twenty-eight months of operation, the Act led to the termination or merger of 700 advisory committees. The annual review of advisory bodies is assisted by the Committee Management Secretariat which operates from the Office of Management and Budget. The reviews are carried out by the standing committees of Congress which take responsibility for the review for those committees under their jurisdiction. The President reports annually to Congress on the net results of this process.

Another glimmer of reform came from the state of Kentucky in 1974 where legislation was passed requiring the abolition of all administrative regulations unless they are (a) printed in the Administrative Register and (b) filed and reviewed by the Administrative Regulations Review Sub-Committee. By 1975 Kentucky had trimmed its regulations from 2572 to 1601, a decrease of 38%.

One can only speculate on why the concept of Sunset has just now become acceptable and so widely popular in the United States. It is

difficult not to believe that some mileage has been gained simply by the appeal of the term itself; like P.P.B.S., M.B.O., and Z.B.B. before it,it is submitted that at least part of Sunset's appeal lies in the fact that it offers a catchy solution, nay a "buzzword" remedy, which has helped start the bandwagon rolling. The trouble is that often the policy is adopted before the machinery necessary to execute it is in place. Too often, however, that machinery is in itself difficult to modify or dismantle in the light of the experience which follows.

Bruce Adams is the Associate Director of Issue Development for the Common Cause national organization. In an article for the Administrative Law Review, he offers some further insights into the popularity of Sunset. He suggests that the concept can be seen as an attempt to countervail the post-Watergate demise of public trust in government so that it can be seen as something other than a secretive maze dominated by special interests. Certainly the period since 1974 has witnessed a trend towards more openness in government. This is evidenced by the laws that are complementary to Sunset, namely the "sunshine" legislation which has recently appeared in the statutes of forty-nine states, requiring open meetings, and disclosure vis-a-vis campaign financing, lobbying and personal finances.

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Advocates of Sunset set out ten basic principles:

(1) Programmes and agencies covered under the law should automatically terminate on a certain date unless affirmatively recreated by law.

(2) Termination should be periodic (e.g. every 7-9 years) in order to institutionalize the process of re-evaluation.

(3) Like all significant innovations, introduction of the Sunset mechanism will be a learning process and should be phased in gradually, beginning with those programmes to which it seems most readily applicable.

(4) Programmes and agencies in the same policy area should be reviewed simultaneously in order to encourage consolidation and responsible pruning.

(5) Consideration by the relevant committees of Congress must be preceded by competent and thorough preliminary studies.

(6) Existing bodies (e.g. executive agencies, Office of Management and Budget) should undertake the preliminary evaluative work, but their evaluation capacities must be strengthened.

(7) In order to facilitate meaningful review, the Sunset proposal should establish general criteria to guide the review and evaluation process.

(8) Substantial committee re-organization, including adoption of a system of rotation of committee members, is a prerequisite to effective Sunset oversight. Critics claim that a rotation system would promote the improved objectivity of committee members; at the very least it would help break up the "unholy trinities" at the standing committee level between members, bureaucrats and lobbyists.

(9) Safeguards must be built into the Sunset mechanism to guard against arbitrary termination and to provide for outstanding agency and displaced personnel.

(10) Public participation in the form of public access to information and public hearings is an essential part of the Sunset process. Again, support for public participation is founded on grounds of restoring public trust in government. 7

These principles can be set in motion in the following model procedure for a Sunset review:

> Let's take a licensing agency and its underlying statute that are set for termination on July 1, 1979. At least one year before termination -- preferably as early as the spring of 1978 -- representatives of the relevant standing committees of each house should meet with representatives of the agency and the state's evaluation agencies. From this meeting, the committee should establish a work plan for the year-long evaluation. In most cases, the agency under review would be asked to provide certain basic data. The committees would designate in their work plan whether, for example, the governor's budget office or the legislature's fiscal staff would prepare an evaluation report summarizing

basic findings and providing policy options. The committees should receive the evaluation report in the late fall or early winter of 1978. Public hearings should be held before the session. This should allow the committee time to prepare a committee report and draft a bill incorporating needed substantive changes long before the end of session logjam.

A few notes are in order about the implementation of the above - stated principles. Once a manageable and targeted agenda for Sunset review has been established, the key element becomes the evaluation process. It is recommended that the evaluation reports be prepared in the executive branch of government rather than by legislative standing committee. The latter are too understaffed, overworked and perhaps too politically vulnerable to perform the type of analysis necessary in the first instance (political judgements having their place"in the sun" during the decision-making process). Most people agree that the executive branch needs be considerably augmented in order to carry out the review process. This would require the development of a multidisciplinary evaluation staff, perhaps tapping the universities for professors and students to aid in the evaluation assignments. In Colorado, as we shall see, the responsibility for the preparation of the evaluation reports was given to the state's Department of Regulatory Agencies (DORA). However, because that central staff agency lacked the necessary manpower to do the task, Public Affairs Professor Michael March and a team of student "interns" offered their services and almost independently carried out the work.

Once staffing problems have been solved the development of what is called the evaluation work plan is essential. This is a detailed list of evaluation questions against which the programmed agency is assessed. These specific benchmarks are based on two broad evaluation criteria which often take the general form of:

(1) Determination of Need: Should the government or the agency be performing the function under review?

(2) Evaluation: If the former, then how could the function be better performed in that arena?

If the latter, then how well has the agency fulfilled its mandate?

Of course, every Sunset law frames the evaluation criteria differently and often the perspective varies. In Florida, for instance, there are six basic criteria, which include:

(1) Is there another less restrictive method of regulation available which could adequately protect the public?

(2) Are all facets of the regulatory process designed solely for the purpose of, and have as their primary affect, the protection of the public?

While the government evaluation staff members are preparing their reports they are aided by the self-evaluations being done by the agencies under review. In these cases, the government evaluation staff sends a detailed questionnaire to the agency and requests detailed responses. For example, the 1977 report to the Texas Sunset Advisory Commission by the Texas State Board of Public Accountancy requested that the following criteria analysis be prepared in tabular form.

(1) Efficiency: Details were requested on the numbers of employees, sources of revenue, job classifications and reporting relationships, finances and operating budget. The Board was asked to provide a narrative summary on the efficiency of its operation and it was given the option to comment on ways to improve on this dimension of its operation. To the latter, the Board had no suggestions.

(2) Objectives: The Board was tested on its objectives and the extent to which these objectives were being achieved. Data was solicited on the numbers of C.P.A. exam candidates, numbers of permit holders and numbers of complaints closed. Again, this Board did not have any ideas about how to improve on the achievement of their stated objectives.

(3) Alternative methods of regulation: The Board was asked how the regulatory process would be affected by less restrictive measures. Answers in this category were predictable. In stating that one of its regulatory functions was the issuance of permits to practise public accountancy in Texas, the Board said that the effect of eliminating the particular function would be the "loss of opportunity for the citizens of the state to know who is an accredited public accounting practioner and who is not." [9]

(4) Overlap: The Board was asked about the extent to which it felt its functions overlapped with those of other agencies. To this, the Board reported that there was no overlap.

(5) Statutory Changes: The Board was asked if it had ever made recommendations to the Legislature for statutory changes calculated to be for the benefit of the public rather than the agency. Again, the response in this case was negative.

(6) Complaints: The Board was questioned about the promptness or effectiveness with which it disposes of complaints. Tabulations were requested on the numbers of complaints, Board action, disposition of complaint and time taken to do so.

(7) Public Participation: Questions were asked about the Board's encouragement of public participation by way of publications and advertisements (bilingual? how distributed? cost?), conferences and training serminars (fees?) and rule changes (any public hearings beforehand?).

(8) Civil Rights: Details were solicited about the Board's compliance with equal employment opportunities and the rights and privileges of individuals. The Board had to spell out its Affirmative Action or Equal Employment Opportunity Plan.

(9) Conflict of Interest: Commentary was requested about the extent to which the Board has and enforces rules regarding the conflict of interest among employees. Board members are shown the appropriate standards of conduct on this matter.

(10) Accessibility: The Board was asked if it complies with Texas legislation regarding open records and meetings. Replying to specific questions under this criterion, the Board replied that its rules of conduct and procedure are published in the Texas Register. Discipline actions are

usually published, but the Board decides not to publish cases if Board members deem them to be of interest or concern to the public. The Board also listed the dates, locations, and purposes of meetings; indicated whether or not notice had been given, minutes filed after the meeting and whether those minutes were available for public inspection.

(11) Impact of Termination: The Board was asked to comment on the impact in terms of federal intervention or loss of federal funds if it were abolished. There would be no loss of funds from the Texas treasury if the State Board of Accountancy were abolished.

While the agency responses are being fed into the government evaluation process, a performance audit of the agency is being completed. In the U.S. this is either done by the governor's budget office or the legislature's fiscal staff. It is important that these two activities (i.e. evaluation and performance audit) be co-ordinated so that questions are not duplicated and so that both reports are ready for joint presentation to the legislative review committee.

In the U.S. experience thus far, the task of reviewing the evaluation and financial reports has usually been assigned to an assortment of legislative committees, trying to match agencies and committees by subject area. This practice has been criticized as detrimental to the development of Sunset expertise. Some critics urge the creation of specific Sunset standing legislative committees in state Houses. Again, for reasons already noted, members on such committees should be rotated. Admittedly it is difficult to set a term of office that would satisfy the need to

nurture expertise while at the same time avoid the accusations of creating "unholy trinities".

The Common Cause advocates of Sunset urge politicians to keep the review process open for a variety of inputs. This lobby group sees itself as a catalyst to aid other groups in preparing for submissions to the legislative review committee.

Finally it is important to regard the post-committee stage as the most crucial in the Sunset process. In making its recommendations to the Committee of the Whole, the review body must draft bills and amendments, develop reorganization plans and prepare administrative and executive action reports.

* * * * *

Before looking at the Colorado experience it might be useful to examine some of the general assets and liabilities of Sunset.

Supporters of Sunset centre their argument on the need for an improved legislative oversight capacity for governments grown thick and unwieldy over the last twenty years. They stress the point also on the basis of assuaging the fears of a public turned cynical towards this view of government. Indeed, Alan Rosenthal of the Eagleton Institute of Politics has called legislative oversight the "neglected stepchild" of the legislative process. In effect, a Sunset law forces that legislatures take their oversight responsibilities seriously because to do otherwise means the permanent termination of agencies or programmes. Advocates of Sunset agree that the increased commitment must be supplanted with increased staff support both at the executive and legislative levels. This, of course, makes Sunset a costly business. However, no one has ever denied that Sunset would be an expensive endeavour. Although the term may imply a process "hell bent" on slashing

away programmes and special purpose bodies, the true goal of Sunset does not lie in a "numbers game". It is a plan whose main purpose is to improve the quality of the activities of those entities. This often requires giving more public funds - and delegated authority - to the agencies under review. In Colorado, for example, the Public Tramway Safety Board convinced legislators that it needed more authority to be effective. As a result, the Board was given more subpoena and emergency shutdown power and an increased budget. Both the Colorado Public Utilities Commission and the Division of Insurance Reviews were recommended for budget increases during their Sunset reviews. Sunset should not be regarded as strictly a "yes" or "no" decision facing legislators. It is a process that, while knowing when to say "no" also knows how to say "yes, BUT". Toward this end, the best Sunset laws will insist that there is a range of options between renewal and termination (e.g., improved complaints procedures, more open meetings, reorganization, improved representation on boards). A Sunset programme should measure its success in terms of improving the responsiveness and accountability of self-governing bodies.

In forcing legislators to "clean house", the Sunset mechanism ipso facto forces the agencies and programmes under review to take an introspective look. This has yielded one of the most satisfying effects of Sunset to date. It has fostered a self-awareness in some groups under the microscope such that they are undertaking improvements before the legislatures forces them to do so. (Some groups welcome this increased self-awareness as a step towards increased public awareness of their activities. Others are not so grateful for the opportunity.) In Colorado, the State Board of Medical Examiners has become mush more rigourous in investigating and responding to complaints about physicians.[10] In Montana, after the State Board of Accountancy produced an unhelpful internal report for the Sunset evaluators,

that group established a special task force which concluded that there was need for improvement in the operations of the Board.

Sunset as a concept has had some broad political appeal and the role that this has played in its popularity cannot be denied. Democratic and Republican politicians alike seized on the idea and their hard work has certainly accelerated the sweeping enactment of Sunset legislation across the United States. (No doubt, the top priority assigned to this by Common Cause was also a key factor.) Nevertheless, it remains to be seen how valuable a political asset Sunset will be to politicians closely involved in the review process. Especially in the U.S. where lobbies are registered and their interaction with legislators and bureaucrats therefore more entrenched, there is little doubt that Sunset reviews will be the scene of increasingly sophisticated and sometimes bitter lobbying. This will surely have a distorting effect on the nature of the Sunset review. Many groups were caught unaware when the Sunset laws were passed; this is no wonder because of the swiftness with which this was done. This was especially true of the professional and occupational licensing boards, most of which do not have full-time lobbyists. There was some expression also that Sunset need not be taken seriously. However, observers say that some groups under review are rapidly becoming quite competent at manipulating the process. In Colorado, the Board of Physical Therapists has hired one of the student interns who worked on the 1977 Sunset evaluations to help the Board prepare its internal review in anticipation of its turn at Sunset in 1979.[11] In Florida, the Harbour Pilots have hired two former state senators to serve as lobbyists during its Sunset encounter. In Florida and Colorado, the Barbers and Cosmetologists have been angered by attempts to merge the two organizations, lobbying has become quite vigourous and

there is some evidence that they have made inroads into the House Government Operations Committees and Senates in these states.[12]

Even general interest lobbies are preaching careful techniques in their approach to Sunset reviews. Common Cause advises its state offices as follows:

> Another consideration is how best to achieve your selected reforms. There is no single route to follow. Some issues may require that you seek commitments from legislative leadership; other issues may require amendments to the law. For some issues you might approach legislative staff, executive branch officials or the Governor's office. Timing affects these decisions too. ... You should discuss implementation strategies with your Regional Director. [13]

Thus, while the Sunset process may be a highly visible one, it may become problematically so, especially for legislators participating in the preparation of recommendations to the House. Sunset may become so time-consuming and politically treacherous a process as to make lawmaking seem relatively glamourous![14]

* * * * *

Perhaps the biggest problem facing Sunset and its chief proponents is that of gaining some credibility. Skeptics will say that it is impossible to turn around entrenched attitudes towards special purpose agencies and age-old government programmes. To ask politicians to terminate them unless it is demonstrated that they need to continue as opposed to continuing them unless it is shown that they need to be terminated is a fundamental difference in orientation. While the latter would require that an effort be made, the former forces the issue.

Legislators involved in Sunset must show a commitment to this premise and they must be willing to shed their pessimisms in order to assume the increased workload that Sunset review commands.

Of course, this begs the question of how real the threat of termination of a programme or agency is. One would assume that the threat of termination is stronger where government funds are involved. It may also seem predictable that termination will threaten only the weak, that is agencies without strong clienteles or constituencies. No doubt there will be a sentiment among more powerful agencies that says, "I'm alright Jack": that reform and termination is fine but not here. This case will be all the more compelling where the constituency is homogenous and unified and the demands it makes on the public purse negligible. This calls into question the reality of termination in the eyes of professional boards in the U.S. Their constituencies are certainly forceful and their direct demands on the public treasury nil. U.S. critics of Sunset fear that the strong lobbying capabilities of professionals will prevent politicians from biting the bullet in the end. They predict that senior professional groups will band together in a united offensive during the review process, especially if they are reviewed at that same time, as principle dictates. Too, there is the difficulty facing the evaluators of weighing the costs and benefits of regulation. While Professor Peter Aucoin reminds us that "The public interest is as much affected by regulation as it is by expenditure",[15] again the ultimate decisions will be made in the political arena rather than in the bureaucratic one. If Sunset review must endure the resistance, the antagonism, and the fierce lobbying of those it would examine then the stakes are being fought in the appropriate arena. But only tough-minded and well thought-out decisions will prove that the stakes are real. This will take a concerted effort; Sunset subjects are learning the rules as fast as are the reviewers. One public accountant, writing to the AICPA's State Legislation Committee

relates the proceedings of the Alabama ("high-noon") Sunset hearing on the State Board of Public Accountancy:

> ...The legislators doing the questioning with two exceptions, were novices in the financial area. The hearing lasted for approximately one and one-half hours and at the end of that time the meeting was adjourned without any comment by the legislators as to what their plans might be. However, one of the most knowledgeable of the Legislators, who happens to be a senator from the county in which I live came outside and talked to us and indicated we should not be concerned. He assured us there would be no problems ....
> there has been no attempt to terminate any agencies in Alabama other than certain agencies which are no longer active. 16

The AICPA Sunset Handbook, which recounted this episode, goes on to urge state boards to resist strongly any recommendations for changes to the accounting statutes which might be harmful to the public (what constitutes "harmful to the public" is never explained further).

The AICPA suggests to its members that they depend on the accounting societies' Key Man Programs for leadership in lobbying efforts. These organizations consist of politically keen C.P.A.'s who "can be utilized to educate legislators in the damaging ramifications that could result if the accountancy law were weakened."[17]

Some, however, have suggested that predictable attitudes on the part of Sunset subjects can be controlled, at least in the evaluation stage. Betsy Sherman of Common Cause has observed that the attitudes of evaluators are very important. She has found that evaluators who sit down and explain the process to agencies, and who make the fact-finding process a partnership, are likely to yield more co-operative assistance. Some accounting boards have been concerned and careful but not unreceptive.[18] Ms. Sherman's observations also stress the impact of strategy - on process if not on outcome. It has been

her experience that where boards under review see the evaluation report at the same time that the legislative review committee sees it, this causes tremendous anger. Much preferred, to her point of view, is a plan whereby the board gets to see the evaluation report before it is formally filed with the legislative committee. At the same time, the latter group is given either a summary or an informal briefing session on the report so as not to be caught unprepared for the onslaught of lobbying. Ms. Sherman suggests that agencies be told that their comments on the report must be submitted within a short period of time and that they will either be appended to or incorporated in the report. This, she says encourages less antagonism during the public hearings stage.

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The Sunset mechanism faces an uphill battle in gaining acceptability among all who must be involved. The analysis and review involved is costly and time consuming; at both the executive and legislative levels, adequate funding for suitable staff and for lead-time for the preparation and review of evaluation reports is a must. Formats for evaluation and for public hearings must be clearly spelled out from the start, oftentimes before the nature or techniques of review are known.

Sunset reviews must be carefully and selectively phased in; to do otherwise risks it being labelled at the least as an exercise of the rubber stamp - or worse yet, just an ineffective and inefficient as any government programme it threatens to terminate on the same grounds.

The credibility of the Sunset process will depend on the committment of legislators to evenhanded reviews. This in turn will require that evaluations are based on excellent research which poses thoughtful scenarios for improvements or alternatives to the status quo.

Ultimately, the success of Sunset will depend on the same source which gave it its life's breath - the commitment of legislators to do work that is sometimes neither "fun", because it is retrospective, nor politically rewarding, because it is not always highly visible. [19]

The Colorado Experience

In 1975, an Interim Committee of the Colorado Legislature was conducting a review of the Department of Regulatory Agencies (DORA) with a view towards increasing the accountability of agencies, boards and commissions to the Legislature. It was during this time that Common Cause lawyer Craig Barnes suggested the Sunset mechanism. The Interim Committee, having looked at regulatory agencies long enough to be frustrated at their sheer numbers and their failure to report to the Executive, the Legislature or the public in any useful way, was therefore anxious to find a way to provide the necessary scrutiny and control. In mid-1976 the Colorado Sunset bill passed into law by overwhelming majorities in both the House of Representatives and the Senate. The statute was to apply to the state's 43 agencies, boards and commissions only.

Although the final votes reflect a resounding enthusiasm for the Sunset concept, the road to the passage of the bill was less than smooth. First, the bill's chief Democratic sponsor in the Colorado House of Representatives lost the 1976 election. This meant that the responsibility for co-ordinating votes fell solely to the co-sponsor, Republican Senator Fred Anderson. Secondly, many thorny questions arose during the development of the Sunset bill, and because legislation of this type was really without precedent, answers were difficult to find:

(1) How would the sequence of agencies for review be determined? - by lot? by politicians? by their appearance in the statutes?

(2) How would the timing of reviews be staged?

(3) How frequently would the reviews take place? - every six years? - every ten years?

(4) Would a performance audit be necessary in addition to the evaluation analysis?

(5) Would public hearings be required?

(6) Would the evaluation criteria be incorporated into the legislation? Should the focus of the criteria be on public accountability or should it encompass a broader scope of issues?

(7) Should there be a wind-down period permitted to terminate agencies? If so, how long?

(8) In the case of agency liability to whom is that liability transferred?

And more generally,

(9) What should be the scope of activities under evaluation? - all government programmes and agencies only? regulatory agencies? a selection of both? if the latter, who decides?

(10) Who should prepare the evaluation reports?

(11) If a board terminates do its functions automatically die too? If not where are they transferred?

Briefly in response to these dilemmas:

(1) The Colorado Chapter of Common Cause aided legislators in arranging the sequence and grouping of agencies for review. Common Cause aimed at balancing large and small agencies in order to create a manageable workload for each review period; then attention was paid to arranging boards by subject area.

(2) The first round of reviews took place in 1977 when ten licensing boards and three major economic regulation agencies were reviewed. In 1979, another eleven agencies will be reviewed, followed by the balance in 1981.

(3) Reviews will be on a six-year cycle.

(4) The Colorado statute requires the preparation of a performance audit report. State staff auditors were seconded to form a special team for the 1977 reviews. This group conducted field surveys and executed the financial aspects of the Sunset evaluation criteria. The performance audits were submitted to the Joint

(5) Legislative Audit Committee which holds hearings in order to obtain comments on the findings and recommendations by affected boards. Hearings were also held by committees standings on the evaluation reports where the agencies under review and the executive director of DORA testified. Public interest groups were encouraged to participate at this stage.

(6) Broad evaluation criteria for the reviews in Colorado were incorporated into the legislation. These criteria focused heavily on accountability issues but a broader spectrum of information will be sought on the next round. The current evaluation criteria refer to the extent to which: (a) the agency has served the public interest; (b) persons regulated by the agency have been required to assess problems in their industry which affect the public; (c) lay representation has been encouraged and (d) changes could facilitate any of these.

(7) A one-year wind down period is permitted for terminated agencies. Provisions are made for personnel affected by the termination.

(8) The government assumes all liability costs.

(9) As has been discussed above, the Colorado Legislature decided that its Sunset statute would apply only to the 43 regulatory agencies under the jurisdiction of DORA, the umbrella unit for these agencies.

(10) It was decided that the evaluation reports would be prepared by the staff at DORA. However, it became clear very early on that DORA neither had the resources nor the committment to do the evaluations. This is when Professor Michael March, a seasoned policy analyst with a quarter-century of government service behind him, stepped in. He was assisted by thirteen graduate public affairs students in the researching and writing of the task. DORA received a $25,000 grant from the Federal Department of Health, Education and Welfare to conduct the evaluations. This money, it turns out, proved quite opportune: DORA had seriously blundered in not requesting any additional funds for the evaluation process. March estimates the actual cost was about three times that of the HEW grant. DORA's budget was not ruined by this error only by virtue of the fact that March and his students worked many long and unpaid hours.

(11) In order to prevent the transfer of functions of a terminated board to the government, the report of the standing committee must specifically end the functions as well as the board itself.

If the Colorado Sunset statute conveys a dedication to establishing an oversight capability within the Legislature for the activities of regulatory agencies,[20] the actual operation of the first round of

reviews belied this. The legislation lacked any specifications about the process for review in the House and so the responsibility for reviewing reports was assigned to regular standing committees almost arbitrarily based on their availability and workload. These standing committees had access to staffs which were too busy to provide any research services during the regular session of the House. The first evaluation reports were assigned in a rather haphazard way which meant that co-ordination of efforts was difficult and any emergence of general policy trends as a result of the first reviews was hard to discern.

The evaluation and financial reports for the first round were prepared under severe time-constraints; only six to nine months was provided. Professor March has suggested that something in the order of two years is needed to prepare a high quality evaluation report. This report would require the work of a multidisciplinary core staff and some consultants, working with a manageable agenda of agencies for review; the scope of review should be quite broad-ranging, focusing not solely on issues of accountability.

Professor March and his team of students effectively performed that function for the 1977 reviews. DORA had few in-house resources for the task and the Executive Director offered little supervision, although this was needed. In addition, the university group helped draft broad bills which provided the formal basis for consideration by standing committees on terminated agencies which were being recommended for renewal. The team also drafted testimony for the appearance of the Executive Director of DORA before the legislative committees. In all, thirteen reports were prepared, ranging in length from 80 to 280 pages. March devoted some 1500

hours to the co-ordination and direction of this task. His thirteen students collected a total of 12,000 hours of work among them and received course credit for the effort. The costs of the thirteen evaluation preparations were probably around $75,000. This figure does not include the $5,000 costs incurred by DORA for typing and duplicating, the time given by DORA's Executive Director and his Deputy in reading and commenting on the reports, and the time given by the agencies under review themselves.

Preparation of the audit reports required 9000 man hours at a total cost of $133,000. There were 650 pages of reports.

March notes that the auditors had a more cautious approach towards their task than did his team of researchers. The latter was much more likely to recommend abolishing boards. In fact, the DORA research team recommended that six out of the thirteen boards be abolished. Apparently, there was some lack of co-ordination between the DORA evaluators and the State auditors, perhaps because of their differing perspectives; perhaps also because they worked out of two departments. It is worth noting as well that the current Colorado Sunset law allows executive and legislative branches to ignore budgetary recommendations, most of which would emanate from the auditors' reports.

The research undertaken by March and his students became quite broad-ranging. A copy of the evaluation criteria they used is appended to this chapter. Before conducting the analysis, students were asked to work up historical backgrounds of the agencies; to analyse the purposes and goals, the structure and procedures of the organization. Emphasis was

put on the degree to which goals were clearly stated and then clearly followed. Researchers conducted interviews with and collected information from the appropriate boards, did literature searches and comparative jurisdictional analyses.

The first reviews in Colorado provided some useful lessons about the meaning of Sunset. The first, of course, was that the process could produce results. Four agencies were eliminated as a result of the review. These were the State Athletic Commission (which was discovered to be so corrupt that it was terminated without the normal allowance of a one-year wind down period); the Board of Mortuary Sciences; and the Board of Registration for Professional Sanitarians. Duties of the latter two were transferred to city and county officials. The Board of Shorthand Reporters was also eliminated, its functions being given to the State Judicial Administration. The State Boards of Barber Examiners and of Cosmetologists have been consolidated, much to the consternation of both.

The role of the Collection Agency Review Board in consumer protection has been aided by an increased budget. The Passenger Tramway Safety Board has increased its membership and its powers as a result of the review recommendations. The Racing Commission was also extended with some slight modifications. The Legislature continued three agencies for a one-year period. These were the Public Utilities Commission, Institutions for the Aged and the Board of Nursing Home Administrators. The Legislature also voted to extend the Division of Insurance for two years to allow more study. The Governor of Colorado (Democrat Richard Lamm) saw this as a stalling technique by

the Republican Legislature. He vetoed the extensions so that these reviews are coming up again this year.

In all, every agency under review underwent some change in structure, role or mode of operation.[21]

The terminations have not been endured silently. The Shorthand Reporters are particularly angry about their fate. The morticians have been trying to ressurrect their Board before the Interim Legislative Committee on the grounds that the Board helps prevent disease.

The Public Utilities Commission and the Division of Insurance are both large, powerful and hence politically sensitive agencies; in a sense their fates will be a real testing ground for Sunset. However, whereas the research done so far has shown that economic regulation in these two areas has been weak, it is unlikely that the Interim Legislative Committees will recommend termination for either. Professor March predicts this if for no other reason than that the Legislature lacks the expert staff to analyze the issues involved.

The reviews in the Legislature were plagued with other problems as well: hearings were not well attended by the public; legislators were heavily lobbied by affected interests; they were also operating under severe time constraints which often had a negative bearing on the priorities they gave to reviewing a particular agency and to the care taken in re-writing legislation, especially in technical fields.

Professor March has been the most vocal of the principals involved in the 1977 Colorado reviews. He has made speeches and written articles about the experience. His Final Project Report,

entitled Sunset Review: The Colorado Program: Statutes Organization; Methodology, Evaluation Criteria, Results offers useful insights about the process. He stresses the importance of a good information base for the success of Sunset reviews. His impression of the regulatory agencies is that they constitute a "headless fourth branch of government". Few scored well on accountability benchmarks: representation on boards rarely extended beyond members of the industry being regulated; there was little accessibility by the public to the proceedings of board activities; few boards filed annual reports to the Governor or the Legislature and those that did filed poor accounts which failed to set out clearly the board's goals and its success in attaining them. March was appalled at the lack of legislative oversight or government supervision of agencies, boards and commissions. Without elaborating, he found that self-regulation by occupations gave the public interest second priority, but questioned whether de-regulation would offer consumers better protection. He wondered whether the barriers facing Sunset were insurmountable. His experience from the first round had made him skeptical about relying on information submitted by agencies, boards and commissions, with their natural biases. Moreover, he criticized the lack of a well-funded multidisciplinary staff at the executive level to execute reliable studies.

The energies devoted to the first reviews were largely spent on establishing a data base and conducting studies on the economic performance of agencies. Such information was glaringly unavailable at the start. March stressed the need for an ongoing statistical reporting programme for Colorado's special purpose bodies.

Professor March's team produced several hundred recommendations to the legislative reviewers. This had some useful indirect results. Raul Rodriguez, Secretary of DORA, reported that the information and recommendations generated have acted as a catalyst to many "previously lethargic agencies. ... They are cleaning up messy administrative processes and making themselves more responsive to citizen complaints. Many agencies scheduled for review in future years have asked the legislature to pass legislation to reform their operations."[22] There is no doubt also that many recommendations generated by the Colorado evaluation - and the evaluation methodology itself - have been helpful to other states setting out on their first reviews.

Nevertheless, the problems March experienced made the first round sometimes more frustrating than it was exciting.

There were difficulties within DORA which made the evaluation process uneasy. First, there was the aforementioned lack of funds caused by DORA's incorrect assumption that no extra monies need be requested. The evaluation team later received a $25,000 grant from the Department of Health, Education and Welfare, but the exercise ate another $50,000 more into the DORA budget for the 1977 fiscal year.

The Executive Director of DORA was also a source of trouble, thus illustrating the importance of a willing and able administrative environment for the success of Sunset. It has already been stated that DORA had neither enough, nor the right kinds of, staff resources to prepare alone the Sunset evaluations. DORA's Executive Director resisted findings that were critical of the Department: that it was weak and had failed to exercise leadership and oversight. March reports that the Director put pressure on analysts to adopt recommendations generated politically or by special interests without the necessary analysis. He discouraged organizational

recommendations that would transfer boards out of his jurisdiction. Interdepartmental input was negligible, although that perspective would have been helpful. Items requiring administrative changes were neglected by DORA. March concluded that an evaluation staff should be a separate, independent entity with full access to departments, such as DORA, and the agencies under review for information. If this evaluation group is situated at the centre, then it should have no short-term responsibilities.[23]

The legislative arena also presented problems. The entire first Sunset review took only fourteen months to complete: that is, from passage of the Sunset law to votes by the Legislature on the fate of the thirteen agencies. This imposed tremendous time pressures on all participants. The decision to assign reviews to an assortment of legislative standing committees proved quickly to be a mistake. This resulted in a lack of co-ordination among committees in developing policies with respect to desired economic change and approaches to similar agencies. In addition, most committees and their staffs were too busy with previously scheduled business to be able to cope properly with the Sunset reviews. Finally, there was a distinctly mistrustful attitude afoot among legislators who felt that DORA's Executive Director was trying to increase his powers in some of the recommendations.

There was a decided lack of co-ordination between DORA and the Attorney General's office which also created trouble: deputies from that office were assigned to help the thirteen agencies under review draft new legislation. As a result of this contact they became very defensive about the agencies when the reviews took place in

committee. (It should be pointed out that, these draft bills notwithstanding, most boards' activities were in reaction to the DORA and auditors' reports. March states that the agencies' preparation for public hearings was generally poor. This may have been a factor of the swiftness with which the Sunset process overcame them and, perhaps, that some did not take the threat of termination seriously even in the light of unkind evaluation reports.) March stresses that the effectiveness of Sunset will depend on committment in the legislative branch. The Colorado legislation unfortunately lacked a clear-cut assignment of roles for the levels of government. Nor did it require the adequate staff to do the preparatory and follow up work (e.g. drafting legislation, structuring re-organizations).

Professor March makes several other recommendations about the structure of Sunset:

(1) Create a Joint Sunset Review Committee in the Legislature. Supply the Committee with a mulitdisciplinary team of analysts. This would allow members and staff to devote their undivided attention to Sunset reviews and would foster both the expertise and the co-ordination of policy guidelines needed. The Committee should also have access to call in ad hoc specialists. On the other hand a Sunset Review Committee could face resistance because of the tremendous power it would hold. Members would have to be very careful to protect their vulnerability in the fire of steady lobbying.

(2) Adequate time should be given both to prepare the evaluation reports and to review the reports in committee in order to make

recommendations to the House. March advises a 2 - 3 year time frame for this process in order to avoid the scheduling problems experienced in 1977.

(3) Appropriate participation by the Governor and by the General Assembly is necessary. The Governor's role was ignored during the first Colorado reviews, although he did exercise his veto power at the end. March feels the Chief Executive of the state should take some responsibility towards co-ordinating the Sunset evaluations. It is difficult to justify this with the need for independent evaluation reports in the first instance. Nevertheless the Chief Executive could probably be most helpful simply by providing support and commitment to thorough and careful Sunset review. Support for the Sunset process must be bipartisan and this requires the determined leadership of the Chief Executive. Also important is the capacity, within the legislative committee performing the review, and later within the General Assembly, to deal with policy, organizational, and administrative issues which cut across agency or program lines. This often requires the drafting of bills or amendments, development of reorganization plans if agencies are to be shifted, and the preparation of administrative or executive action documents. These tasks in themselves require the assistance of a multidisciplinary group.

Sunset legislation requires an active commitment to the belief in legislative oversight and accountability. By introducing a mechanism whereby the "extended family" of government is scrutinized carefully on a periodic basis; it reaffirms - by testing - the

family bond. In so doing it attempts to re-shape and re-define the relationship by enhancing familiarity and kinship of spirit.

Sunset's attractiveness from the Professional Organizations Committee's perspective lies in the fact that it would offer a vehicle for periodic review on a practical cycle of perhaps six or ten years; this would be a rigourous review with many of the same purposes of this current project. The major difference of course lies in the signal (siren?) that would be emitted by mounting a review policy called Sunset. Even before facing the difficulties certain to result from that, a major question that must be answered is, "How necessary is it to threaten Sunset every few years?" Perhaps that will be easier to answer once the legislative results of the Professional Organization Committee are tallied and the effects of same on affected interests are measured.

No doubt there are many attractive aspects to Sunset. Indeed, it lives up to its title as an action-forcing mechanism and ensures that the action is lodged in the right place: the legislature. Sunset will have achieved its greatest success if it instills in any house of representatives the oversight capacity that is so often lacking:

> There is now general agreement about the necessity for delegated legislation; the real problem is how this legislation can be reconciled with the processes of democratic consultation, scrutiny and control.[24]

One of the most satisfying results of Sunset legislation in the U.S. so far is that is has served as a catalyst for some introspective reflection on the part of government agencies and programmes. Some, seeing the fate of those that went before them, have "cleaned up their acts" prior to their encounter with the Sunset evaluators. Here,then,another example of Sunset as an action-forcing mechanism.

Nevertheless, other action is called forth by the threat of termination. Lobbying activities can be expected to grow more fierce and more sophisticated as Sunset confronts other groups. Unfortunately, there have been too few reviews of the major professions to assess the impact of Sunset on these groups. The AICPA Sunset Handbook indicates however that the CPA boards are getting well-organized for the experience and that a threat of any degree will not be treated kindly.

One can be assured that lobbying efforts will never cease in a Sunset atmosphere. Surprisingly, Colorado has opened the door to increased lobbying with an amendment to the 1976 law which gives a one-year grace period if the Legislature fails to act on extending an agency. While this change was made to minimize the danger of arbitrary terminations, there is little doubt that the time of grace will be used by an agency to build up popular support. Interest group action is certainly more dynamic in the U.S., where some legal lobbies such as Common Cause serve as vigilant and vocal watchdogs over innovations such as Sunset. If legislators ever forget that the threat of termination is real then these groups will remind them.

Once again one must ask whether this threat is really necessary; rather, whether that threat, as it is embodied in the term that will be widely used, is really the message that decision-makers want to convey to the public and agencies themselves. Or do we instead want to relate, at least to the professions under this review, that the government will periodically take stock of their activities and make

recommendations for improvements of same? Then, perhaps, "Sunset" is too big a stick to wave, especially in view of some of the consequences outlined above. This assessment might better be made after the legislative results of the P.O.C. are realized. It is suggested that, to the extent we need titles at all, a more positive sounding one ("Sunrise" perhaps) may at once be sufficiently invigorating to politicians and the public and therapeutic yet palatable to the agencies which would be reviewed. This is not to say that special purpose agencies, such as professional organizations, would not be subjected to the same rigorous evaluation as would be performed under Sunset. Only that it would be framed in a different, quieter and more optimistic manner. The boundaries would be changed but the action-forcing mechanism would remain the same, at least insofar as legislative oversight is concerned. The costs and benefits; political or otherwise, of Sunset vs. Sunrise would need be weighed carefully.

Then too are the implications of such periodic review on other agencies, boards and commissions of the government. It would be difficult to isolate the professions under this study without saying something about a similar test for all areas of delegated jurisdiction. There are rumblings currently in Ontario about deregulation generally and review specifically. Minister-without-Portfolio, Douglas Wiseman has been heading an Agencies Review Committee since early 1978. The Committee is examining the roles of agencies, boards and commissions with a view to making recommendations about deletions, mergers, or re-structuring. On another front, Stuart Smith, in a resolution he compared to the U.S. Sunset laws, has recommended an "inventory clearance" of agencies, boards and commissions

to be co-ordinated by the Standing Procedural Affairs Committee of the Legislature.[25] We have yet to see the fruition of this resolution.

Outcomes of both these events will have a bearing on the destiny of the professions vis-a-vis Sunset. For example, the government might choose to establish a Sunset mechanism creating a central staff agency, similar to Colorado's Department of Regulatory Agencies, out of Wiseman's Agencies Review Committee. Mindful of the problems that have plagued its Colorado counterpart, this agency should have action-forcing terms of reference, be firmly set in the executive branch, with strong staff support, have the ear of the Premier and the capability to feed recommendations into the Legislature (perhaps via the Standing Committee on Procedural Affairs).

The Sunset concept has some important qualities that could enhance the legislative oversight of delegated authority in Ontario. Though few would doubt that this is necessary, many would argue that the iron fist is better than the velvet glove.

Footnotes

1. The states with sunset legislation are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Kansas, Louisiana, Maine, Maryland, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, and Washington.

2. Robert D. Behn, "The False Dawn of the Sunset Laws" in The Public Interest, Number 49, Fall, 1977, p.104.

3. Bruce Adams, Associate Director of Issue Development for Common Cause, "Sunset: A Proposal for Accountable Government" in Administrative Law Review, Volume 28, No. 3, Summer 1976, p. 513.

4. Robert D. Behn, op cit, p. 105.

5. Wm. O. Douglas, Go East Young Man quoted in Adams, op cit, p. 520.

6. A loophole in this Act exempts from such review those advisory bodies whose duration is otherwise established by law or who file a charter with the appropriate Congressional committee.

7. See Bruce Adams, "Sunset: A Proposal for Accountable Government" op cit, and Common Cause, "Sunset: A Common Cause Proposal for Accountable Government" undated mimeograph.

8. Bruce Adams, Speech to National Conference on State Legislatures, Conference on Sunset Legislation, New York City, April 23, 1977, p. 7.

9. Texas, Report to the Sunset Advisory Commission by the Texas State Board of Public Accounting October 1977, p. 25, in American Institute of Certified Public Accountants, State Legislation Committee. AICPA Sunset Handbook: A Guide to the Sunset Review Process (New York: AICPA, 1978).

10. The Rocky Mountain News suggested that this development was attributable not only to the new Sunset law but also to the Board's improved statutory enforcement powers. See Rocky Mountain News, Denver, Colorado. "Policing Colorado's Physicians" Friday March 17, 1978.

11. Anecdote related in a conversation with Professor Michael S. March, University of Colorado, Public Affairs, September 1978.

12. From a conversation with Betsy Sherman, Common Cause, October 1978.

13. Common Cause. Memorandum on Sunset Materials, February 3, 1978, p. 4.

14. Bruce Adams Speech to Conference on Sunset Legislation, op cit.

15. Peter Aucoin, Public Accountability in the Governing of Professions: A Report on the Self-Governing Professions of Accounting, Architecture, Engineering and Law in Ontario. Working Paper #4 prepared for the Professional Organizations Committee (1978), p. 111.

16. AICPA Sunset Handbook, op cit.

17. Ibid, p. 5-1.

18. Conversation with Betsy Sherman, Common Cause, October 1978.

19. Although certainly in a time of economic constraints in government the political rewards of Sunset may be enhanced.

20. The preamble to the Colorado law reads:

> State government actions have produced a substantial increase in numbers of agencies, growth of programs, and proliferation of rules and regulations and the whole process developed without sufficient legislative oversight, regulatory accountability or a system of checks and balances. The General Assembly further finds that, by establishing a system for the termination, continuation or re-establishment of such agencies, it will be in a better position to evaluate the need for the continued existance of existing and future regulatory bodies. (H.B. 1088 of 1976 and S.B. 6 of 1977.)

21. See Neil Peirce and Jerry Hagstrom, "Is it Time for the Sun to Set on Some State Sunset Proposals?" in National Journal, June 18, 1977;

Sid Brooks "The First Measure of Sunset" in The Colorado Lawyer, January 1978;

and Gerald Seib, "Colorado's Prototype Sunset Law Called a Success as Several Agencies are Killed, Merged or Moved" in The Wall Street Journal, Wednesday, August 24, 1977.

22. Neil Peirce and Jerry Hagstrom, "Is it Time for the Sun to Set on Some State Sunset Proposals," op cit.

23. See Professor Michael S. March and students, Graduate School of Public Affairs, University of Colorado at Denver. Sunset Review: The Colorado Program: Statutes, Organization, Methodology, Evaluation Criteria Results. Final Project Report, (Colorado: Regents of the University of Colorado, 1977).

24. A. Beuvan speaking before the British Select Committee on Delegated Legislation, 1953. Quoted in Special Committee on Statutory Instruments, "Delegated Legislation in Canada" in W.D.K. Kernaghan and A.M. Willms (eds.), Public Administration in Canada: Selected Readings 2nd edition (Toronto: Methuen, 1971), p. 409.

25. Dr. Stuart Smith, MPP, Leader of the Ontario Liberal Party, "Information", October 20, 1977.

APPENDIX

COMPREHENSIVE SUNSET REVIEW REPORT OUTLINE

from

Professor Michael S. March, and students, Graduate School of Public Affairs, University of Colorado at Denver. Sunset Review: The Colorado Program: Statutes, Organization, Methodology, Evaluation Criteria, Results. Final Project Report (Colorado: Regents of the University of Colorado, 1977).

Appendix D

COMPREHENSIVE SUNSET REVIEW REPORT OUTLINE

(Developed by University of Colorado Sunset Intern-Professor Team)

Note: This outline is intended as a guide for structuring the report and for the nature of the issues to be investigated. It should be modified as to its specifics from agency to agency. The Executive Summary, of course, draws on the body of the report. The recommendations should be distributed throughout the report and should be preceded by appropriate factual documentation and analysis in each case. Use sideheads and subheads to structure report and specifically set out each recommendation in identifiable, numbered form. The Executive Summary is preceeded by a transmittal letter; a table of contents which also lists tables, charts, and recommendations; and by a preface.

PART 1: EXECUTIVE SUMMARY

I. Summary of Findings and Recommendations

A. Philosophy of the evaluation
B. Findings and recommendations regarding whether the agency is needed in public interest (briefly).
   1. Analyze historically whether conditions and environments in which the agency was created have changed so it may not be needed or may require a new approach.
   2. Is there a current need for the agency and its functions which warrants the use of the State's police power for the protection of the public's health, safety, or welfare?
      a. Is the statutory purpose consistent with the public interest and does it clearly state the public purpose of the agency?
      b. Intrinsically is there a continuing need for this sort of regulation in the public interest under present conditions? What are the public and consumer benefits of the regulation as it is presently carried on?
      c. What is the hurt and the social cost of the present regulatory program? Does the regulation have the effect of directly or indirectly increasing the costs of goods and services, is it anti-competitive or anti-public or is it being run in the interest of a special group or an industry, etc.?
      d. Would the absence of regulation significantly harm or endanger the public health, safety, or welfare? Would resort to a free market produce more or less harm than the existing regulatory process?
   3. Are there other alternatives besides the continuation of the regulation which will adequately protect the public?
   4. Is the existing regulatory agency perhaps so inefficient or ineffective, or so neglectful of the public interest, that it does more harm than good, even if the statutory purpose is valid?

5. Are the statutory purposes, goals, and the objectives for the agency in need of reformulation to convert it to an agency which functions in the public and in the consumer interests?

C. Findings and recommendations on how to improve the efficiency and effectiveness of regulation if the agency is to be continued.
   1. Analysis of purpose, goals and objectives:
      a. Changes and revisions in the statutory purpose of the agency.
      b. Changes and revisions in rules and regulations.
      c. Analysis of goals and objectives and their clarification.
   2. Analysis of organization and procedures to determine whether they are consistent with the public interest.
      a. Analysis of the organization and the membership of of the board and its implications for effective regulation.
      b. Analysis of the procedures and the operations of the agency from the public interest standpoint.
   3. Analysis of the accountability mechanisms and whether they are consistent with the public interest functioning of the board or commission.
   4. Analysis of the economic and social impacts of the board or commission.

D. Analysis of possible alternatives for future action and recommendations with respect to desirable course of action.

PART 2: DESCRIPTION, ANALYSIS, FINDINGS, AND DETAILED RECOMMENDATIONS

II. Historical Perspective on Board or Commission

A. Causal factors of creation in comparision with current conditions.
   1. Initial needs--problem orientation--industry/professional situation.
   2. Market failure--economic restrictions, competitive forces, etc.
   3. Initial political forces--special interests
   4. Assessment of current conditions in relation to the need for the board.

B. History and development of statutes and regulations.
   1. Efforts initiated by the Legislature-- Legislative history.
   2. Proposals by the board or commission
   3. Interests affecting legislation and statutory changes

C. Development and growth of board or commission--chronology--date of establishment and dates of major modification.(briefly)
   1. Board composition changes.
   2. Staff and personnel--how has the number of staff increased in the past 10 to 20 years?
   3. Technological development
   4. Budget trends
   5. Fees and charges--policies--has the agency always been self supporting.

D. Previous studies and investigations of board or commission.
   1. Audits
   2. Interim legislative studies
   3. Judicial review
   4. Miscellaneous studies or reviews, e.g. newspapers, periodicals
   5. Evaluation reports

III. Analysis of Public Purpose, Public Need, and Public Goals

A. Is there a public need for the agency and its functions which warrants the use of the State's police power for the protection of the public's health, safety, or welfare? Intrinsically is there a continuing need for this sort of regulation in the public interest under present conditions? What are the public and consumer benefits of the regulation versus the harm from it?

B. Analysis of the stated purposes of board or commission.
   1. Cite original regulatory purpose of the board or commission
   2. Cite present statutory and regulatory purpose of the board or commission
   3. Are the presently stated purposes valid in the light of present and forseeable conditions?

C. Are the statutes as they are now written, fully consistent with regulation in the public interest, rather than in the private interest?
   1. Do they clearly state the public purpose of the agency? Specify goals and objectives?
   2. Is the consumer protection purpose clearly stated?
   3. Cite statutory deficiencies that may affect the board or commission in serving the public interest.

D. Are the board's or commission's rules and regulations fully consistent with regulation in the public interest rather than in the private interest?
   1. Summarize applicable rules and regulations as they relate to the public interest.
   2. Cite regulatory deficiencies by the board that indicate that it may be adverse to serving the public interest.
   3. Are clear goals and objectives for public protection specified in the rules, regulations, and operating manuals?

E. By exercising the state's police power through this board or commission is there a significant contribution to the protection of the public health, sately, or welfare?
   1. Cite evidence that the board's or commissions activities have or have not benefitted the consuming public (draw on following sections.)
      a. Would the absence of regulation significantly harm or endanger the public health, safety, or welfare? Would resort to a free market produce more or less harm than the existing regulatory process?

2. Cite evidence to show that the board or commission has or has not acted in behalf of a special industry or occupational group.
   a. What is the harm and the social cost of the present regulatory program? Does the regulation have the effect of directly or indirectly increasing costs of goods and services, is it anti-competitive or anti-public, or is it being run in the interest of a special group or in industry, etc.?
3. Cite evidence to show that the board's or commission's past behavior has or has not been effective.
   a. Is the existing regulatory agency perhaps so inefficient or ineffective, or so neglectful of the public interest, that it does more harm than good, even if the statutory purpose is valid?
   b. Do the statutes, rules, procedures, or practices exclude the public from impact on the agency?

F. What harm would result to the public health, safety and welfare if regulation were ended?
   1. What evidence exists that the public would suffer (or has suffered) in the absence of regulation?
   2. Is the board or commission needed in its present status to serve the general public interest?

G. Are there other alternatives besides the continuation of the present form of regulation which will adequately protect the public.
   1. Are the statutory purposes, goals and the objectives for the agency in need of reformulation to convert it to an agency which functions in the public and in the consumer interests?
   2. What alternatives would accomplish the essentials of public protection with less cost and less use of the public regulatory process?

IV Organizational Analysis

A. Is the organization of the agency consistent with its public or consumer protection purpose?
   1. Is the organization suitable for the purposes intended?
   2. Is the organization well aligned to perform the functions necessary to protect the public?
   3. Are the appointees public members or special interest members?

B. Description of organization agency or board.
   1. Structure--organizational chart with staff allocation to units.
   2. Composition of board members--selection process, terms, compensation and expenses (including either full time or part time members.)
   3. Staff-standards and qualifications with focus on necessary industry experience. Is there overrecruitment from industry?

C. Issues of authority and supervision.
   1. Is the authority vested in an accountable head of agency or diffused in board?
   2. Are there clear lines and mechanisms for supervising the board and holding it responsible?
   3. Does board have clear relationships to obtain necessary budget, personnel, management services, etc., necessary for effective operation?

D. Soundness of organizational structure
   1. Effectiveness of relationship of the agency to DORA.
   2. Relationships with other boards and commissions, particularly in related spheres.
   3. Internal relationship between board members and staff of agency
      a. How far do board members get involved in administration?
      b. To what extent does staff participate in determining policy?
   4. Are the staff qualified in specialities and do they have analytical capability?
   5. Is there a solid data base and management information system?
   6. How does Colorado organizational structure in this area compare with that in other states?
   7. Examine professional/political affiliations and geographic residence of board and principal staff members.
   8. Would functions of agency be better served in another agency or by consolidation or transfer?

E. Geographical organization
   1. Is the agency organized to serve outlying areas of state?
   2. Do citizens in outlying areas have equal access to services?

V. Analysis of Operating Procedures and Standards to Determine if Agency is Efficient and Effective in Protecting the Public and Consumers.

A. Are the functions and procedures properly organized and monitored?
   1. Are there clearly written operating manuals and procedures?
   2. Is there adequate monitoring through progress reports and other suprevision?
   3. Are there adequate communications internally and with department?
   4. Is there a good management information system, ideally one which is automated?
   5. Agency budget--how is budget for agency developed and submitted e.g., is it individual or consolidated with other boards?

B. Major functions and procedures for accomplishing goals and objections.
   1. Identify functions, e.g., reception of applications, issuing of licenses, testing, conduct of hearings, inspections, rate setting, handling of complaints, public involvement, etc.

2. Extent and nature of written procedures for accomplishing functions.
3. Relationships with other State Agencies, e.g., internally with DORA and externally with other departments, etc.
4. Intergovernmental relationships with Federal agencies or agencies from other states.
5. Stated procedures for relationships with the general public e.g., hearings, complaints, solicitation of recommendations for improvements.

C. Board's criteria for regulation.
1. What standards are set to determine qualifications of licensees?
2. What standards are set to determine requests for tariff or rate increases, i.e., standards for economic regulation?
3. What standards are set to determine needs for disciplinary action?
   a. Suspension
   b. Revocation
   c. Censure
4. What standards are set for the conduct of inspection?
5. What standards are set for license renewal or certification?
6. Review adequacy of stipulated standards with respect to public concerns as health, safety, environmental impact, protection of public from exploitation or undue secondary costs.

D. Frequencies and timing of actions.
1. Number times exams given per year.
2. License duration (automatic?).
3. Work flow, e.g., is time set by the population regulated or by the board/commission?
4. Is work load seasonal or evenly distributed through the year?

E. Administrative efficiency analysis.
1. Analyze work loads in various activities vs. FTE's and administrative costs.
   a. Staff to full-time employees (FTE)
   b. Relate the amount of service output to the amount of input required to produce it
      (1) manhours per inspection
      (2) manhours per license issuance
   c. Determine unit cost
      (1) compute total cost of each activity
      (2) determine the number of work units performed for each activity.
      (3) divide the total cost of the activity by the number of work units performed
   d. Examine personnel utilization--compare this data to that of other boards or businesses which perform similar functions or activities.
   e. Examine the board's backlog to determine how it is handled and whether the oldest and most important transactions receive priority
   f. Analyze work flows and scheduling
2. Analyze utilization of board members' time

F. Effectiveness analysis of the agency.
   1. Degree to which intended purposes of service are being met.
      a. Put goals into measureable units
      b. Compare board's or commission's performance with stated goals
   2. Degree to which unintended adverse impacts of service occur
      a. Measure number of complaints
      b. Survey recipients of service
   3. Adequacy of service provided relative to community's needs or willingness to pay for services
      a. Survey of services
      b. Comparision to other state's boards
      c. Comparison of requests for service to amount provided
   4. Recipient's or citizen's perceptions of the satisfactoriness of service
      a. Survey of citizens, practitioners, board personnel
      b. Yearly percentage increase of complaints
   5. Geographical accessibility of services
   6. Refer to pgs. 58-62 of the Occupational Handbook

VI. Public Accountability and Responsibility: Does the Board's or Commission's Entire Pattern of Regulation and Administration Show a Desire to be Responsive to the Public and to the Consumers (or Patrons) of the Industry (or Occupation) being Regulated?

A. Structure of board members and method of selection and removal.
B. Balance of industry vs. general public or consumer membership on the board.
C. Responsiveness to public interest
   1. Notification and publicity arrangements
   2. Openness of decision making porcedures to public participation and scrutiny, e.g., the Sunshine Law.
D. Existence of organized scrutiny of effectiveness of regulation, e.g., the Sunset Law.
E. Issuance and dissemination of adequate annual report
F. Existence of strong agency analytic capability to analyze the economic and social effect of regulation.
G. Survey of individuals who make contact with and/or use the services of the board or commission.
H. Practitioners which are subject to complaints are promptly and effectively investigated and properly disciplined for due cause.
I. Are the goals and objectives of service to the State of Colorado clearly specified to the public and to the agency members and staff?
J. Procedures for dealing with conflict of interest problems--record of such from past investigations and newspaper reports.

VII. Analysis and Findings Regarding Evaluation Criteria in House Bill 1088, Section 1-(8)-(b) (Special Section Geared to Colorado Criteria)

(I) Qualified applicants to serve the public.
1. License/applicants
2. Qualification system
   a. What is it and how it works
   b. Purposes of qualification system--does it serve the consumer or the industry?
   c. How do educational and other standards for licensing protect the consumers?
   d. To what extent does the testing, review and other licensing activities fairly balance the practitioner conflict of interests--is the net result unduly restrictive or lax of entry into the profession.
   e. To what extent are practitioners who are the subject of complaints subjected to review of performance--delicensing if record is bad (provide statistics), etc.
   f. Are periodic inspections made of practitioners/industry performance (statistics as to quality of service and reasonableness of price)
   g. Is public notified of practitioners, industries or firms not meeting standards--how is notification made?
   h. Is inter-state reciprocity of licenses permitted?
   i. What is the procedure and mechanism for reviewing fitness of practitioners regarding whom complaints are made?
3. Refer also to pgs. 22-29 of the Occupational Handbook

(II) Extent to which agency and industry has complied with State and Federal Affirmative Action requirements.
1. What statutes are involved?
2. Internal compliance--percent of employees vs. percent of state population for each ethnic grouping.
   a. Board composition
   b. Staff composition
3. External compliance (same criteria as above)-- regulated population
4. Affirmative action and implementation goals
   a. Do they exist?
   b. How far along is board in implementation?
5. Refer also to pgs. 53-54 of Occupational Handbook.

(III) (A) Extent to which agency has operated in the public interest, and (B) extent to which agency's operations have been impeded or enhanced by (1) existing statutes, procedures, practices, and (2) other factors-budgetary, resources, personnel.
1. Analysis on whether the agency has served the public interest
   a. Composition and orientation of board
   b. Quantity and quality of services--absence of artificial restrictions or supply and restriction of measures to prevent price fixing.

c. Balance between maintenence of reasonable professional standards and over-restrictive entry into the profession
d. Findings on economic impact (from section IX)
e. See also pgs. 30-34, 58-62 of the Occupational Handbook
f. Complaints--See pgs. 40-52 of the Occupational Handbook

2. Impediments or enhancements to serving the public interest
   a. Statutes
   b. Procedures
   c. Practices of DORA
   d. Budget
   e. Resources
   f. Personnel matters
   g. Formal public communications mechanisms
3. Organizational--(see section IV)

(IV) Extent to which the agency has recommended statutory changes to benefit public as opposed to the persons it regulates.

1. Statutory recommendations starting with Fiscal Year 1970 to present
   a. List all recommendations for new legislation for last 6 years.
   b. Who did the recommendations benefit and what were its effects?
   c. What recommendations if any were enacted and in what form?

(V) Extent to which agency requires persons it regulates to report on impact of rules of agency on the public with respect to improved services and economy of services and availability of services.

1. Has the agency or board requested such impact information from its licensees or regulated industries? When, in what form, and how was the information used?
2. Refer to pgs. 70-71 of the Occupational Handbook

(VI) Extent to which persons regulated by agency have been required assess problems in their industry which affects the public.

1. Has the agency or board requested information on industry problems from it's licensees? When, in what form and how was the information used?
2. Refer to pgs. 70-71 in the Occupational Handbook

(VII) Extent to which the public has been encouraged to participate rules and decision making as opposed to participation solely by persons it regulates.

1. Notification procedures regarding rules and decisions
   a. Refer to pgs. 35-37 of the Occupational Handbook
2. What efforts are made to encourage public involvement?
3. What efforts are made to assess the effects of various rules on the public?
4. To what degree does public presently participate in the operation?
5. What future plans exist for increased public input? Creating of communications director?

(VIII) Efficiency of disposition of public complaints by the agency, DORA, or other units of State government.
1. Complaint handling process
   a. Mechanisms and/or procedures
   b. Number of complaints received/year since 1970
   c. Number of complaints resolved/year since 1970
      (1) % resolved in favor of consumer
      (2) % resolved in favor of regulated population
   d. Follow-up procedures
   e. Turn-around time for complaint procedure
      (1) size of backlogs
      (2) resources requires to dispose of back logs.
   f. Budget allocation for this ares--# FTE
   g. Plans for implementation if no present system exists
2. See also pgs. 40-52 of the Occupational Handbook

(IX) Extent to which changes are necessary in the enabling laws to accord with the above.

VIII. Data on Activities, Finances, and Population Served: F.Y. 1970-77

A. Trends of activities and board resources (Tables)
   1. Board composition
   2. Staff and personnel--how has the number of staff increased in the past 10 to 20 years?
   3. Budget trends -- expenditures and resources by types
   4. Fees and charges--policies--has the agency always been self supporting.

B. Population Served
   1. Number of consumers--direct and indirect
   2. Industry members or practitioners--e.g., persons licensed

C. Types of services
   1. #applications
   2. #licenses--new during year and continuations
   3. #complaints
      a. formal and informal
      b. filed and resolved
   4. #hearings
   5. #rate increases
   6. #inspections

D. Administrative costs (provide for total and by type of service or function if possible)
   1. Total costs
      a. Personnel--salary and fringe benefits
      b. Travel and per diem
      c. Capital equipment
      c. Other
   2. Similar data for each major agency activity or organizational unit.

E. Personnel
   1. Total for agency (in each case the number of positions and the number FTE by position, e.g., comparison of number of slots to effort)

a. Board members
b. Professional staff
c. Clerical staff

2. Sub sets as above for each major function or organizational unit.
3. Analyze levels and salaries in relation to tasks (are they approaching job clerically instead of analytically?).

F. Revenues collected by agency (revenues vs. budget)
1. Gross total
2. By major sources or activities

G. Key analytic ratios
1. Revenues as a percentage of costs
2. Back log and waiting time data
a. #license applications
b. #complaints
c. #pending rate cases
d. #inspections
3. Consumer or practitioners served per employee

IX. Economic and Social Impact: Has the Board or Commission Presented Factual Evidence or Analysis which Shows that Its Regulatory Actions Save the Public Money or Improve the Quality of Public Services?

A. Quality of service, consumer complaints
1. Fair prices and service charges for quality of service received
a. Analyze trend of prices vs. consumer price index for the last 20 years.
b. Analyze trend of earnings in occupation vs. general level of wages for past 20 years.
c. Analyze rate of return on investment in the industry over the last 20 years in relation to the general level of profits.
2. Standards of quality of service
a. Administrative network for monitoring the quality standards
b. System for handling consumer complaints

B. Describe what public action the agency has taken in the last ten years to encourage the industry to eliminate waste, hold down inflation in prices, improve quality of service to consumer.

C. Effect of board of commission on marketplace.
1. Effect on supply and demand
a. Does regulation increase price level of goods and service
b. Does regulation effect delivery of services?
2. Effect of regulation withholding practitioners from entering into the industries

D. Is there evidence of monopoly or restriction of competition?

X. Accreditation (for agencies where applicable)

A. Are educational and experience standards up to date, e.g., in relation to other states.

B. What accreditation procedures and criteria are applicable--how is adherence to these standards monitored?

PART 3. OVERVIEW

XI. Alternatives

A. Review of report findings
   1. What is the minimum level of regulation necessary?
      a. Is the establishment of entrance requirements alone sufficient?
      b. Does continuing regulation involve the use of rule-making and disciplinary powers?
   2. Who should regulate?
   3. Are there benefits of communication/cooperation/other accruing from the creation of a board which, when compared with the direct costs of a board warrant its creation?
   4. Can certification/registration powers be places in any existing section of the Executive branch?
   5. Does the exercise of quasi-judicial/quasi-legislative powers involve the background and/or expertise of the occupation or trade?
   6. Can regulatory powers by placed in any existing section of the Executive branch because they overlap with the subject matter?

B. Impact of elimination of the board or commission
C. Impact of consolidation with other boards or commissions
D. Possible new criteria for regulation
E. Possible structural and economic changes
F. Need for budget reductions or increases?

XII. Conclusions and Recommendations

PART 4: APPENDICES

A. Excerpts of relevent statutes
B. Excerpts of agency or board regulations
C. Excerpts from auditor reports or newspapers, etc., regarding agency
D. Excerpts from recent budget requests
E. Excerpts of budget requests, Long Bill Narative, Long Bill, Appropriations Report.
F. Organizational charts and statements of functions (other than listed in (B) above)
G. Excerpts from recent Gubernatorial State of State messages
H. Excerpts from 1968 and 1976 Management and Efficiency Task Force Report
I. Bibliography
J. Evaluation criteria used for this agency

II STANDING AND SELECT COMMITTEES OF THE LEGISLATURE

This chapter will look at two vehicles for review of the professions that are more conventional than the Sunset mechanism. Standing and select committees of the legislature have long played an inextricable part in the conduct of government business at both the federal and provincial levels in Canada. This examination will mostly be a general one, dealing with the structure and process of the two types of committees and evaluating their strengths and weaknesses. A final section, however, will explore two particular applications in Ontario, most notably the Standing Statutory Instruments Committee.

Dr. K. C. Wheare has made the statement that, a governmental committee can be broadly defined as "a body to which some task has been referred or committed by some other person or body."[1] Wheare goes on to point out that a committee is subordinate to the parent body from which it derives its powers and to which it is responsible. Committees can serve any of several functions: they can (a) scrutinize and control, (b) administer, (c) legislate, (d) negotiate, (e) inquire, or (f) advise. There are many reasons why the parent body , that is, the legislature, would choose to give life to a subordinate body , that is, a legislative committee. Indeed, these are reflected in the functions they can serve. Viewing such committees as instruments for parliamentary democracy, one sees their value readily. "In political matters knowledge is the beginning of power, and its lack, impotence."[2] As the agendas of business facing our legislators become increasingly overloaded, legislative committees are employed to streamline the amount of work facing the full House by assigning the tasks necessary for increased knowledge (scrutiny, inquiry, etc.) to a smaller subgroup. The process thus becomes more manageable because the actors are neither so

cumbersome in numbers nor so encumbered with party line. The input of the legislative branch to the policy process is enhanced and better focused. The knowledge base thus having been increased in this efficient manner, the power to govern is strengthened. In addition, committees provide a vehicle for participatory democracy by allowing for public involvement in the discussion of complex policy issues. (This usually takes the form of presentations of briefs to the committees.) Or so the theory goes.

In fact, as we shall see, committees of the legislature are plagued with political and administrative problems.

Standing Committees

Standing committees of the legislature each have from twelve to twenty members sitting on them; membership is proportionate to the party standings in the House. While ministers never sit on standing committees, it is not uncommon for a parliamentary secretary to sit on the committee most relevant to his minister and act as a conduit of the proceedings. Most often it is a member of the governing party who chairs standing committees. This situation gives rise to a serious concern that the government of the day controls the operations of the standing committees; this despite protests that in fact standing committees allow an informal display of views and voting behaviour that is freer of partisan doctrine than can be witnessed in the legislature. Discussions rather than debates are the style and, unlike in the House, the Standing Orders do not curtail the length of "discussion" by any one member.

Standing committees are at liberty to call witnesses and usually tap resources from the bureaucracy, academia and the private sector (business, industry) as the need arises. They are also permitted to travel, ostensibly to gather facts, measure public attitudes and perform an educative

role. In times of fiscal restraint, however, such costs are harshly regarded.

Standing committees can only meet on days when the House is in session and they are confined on those days to meet only in the morning when the House is not actually convening.

Clerks of the House provide the staff support for standing committees. While the composition of the committees is subject to change every time the House is prorogued (or sooner if the party need a "good" member on another committee), there is some effort to maintain continuity in the staff assigned to each committee. While this permanency could lead to the development of some power in the hands of the bureaucrat, the clerk is usually a junior with mostly clerical responsibilities for the committee. He arranges meetings, lines up witnesses and does the paperwork. The committee chairman is consulted on these matters. In some cases, it has been reported, a clerk may advise on questions of parliamentary practice and procedure and help prepare reports.[3] In Ontario,one clerk serves each standing committee. If the government's staff support for committees is rather paltry, the Opposition's is no better. Efforts by the research staffs of these parties are directed more towards the caucus committees, the shadow cabinets.

As a matter of fact, before 1970 the standing committees in Ontario were reflective of the interests of the government departments as well; however,they became so numerous as to make scheduling impossible. Thus, in 1970, Ontario adopted a variant of the British system of five omnibus committees and two specific ones. These are the standing committees on:

(1) Procedural Affairs

(2) Administration of Justice

(3) Social Development

(4) Resources Development

(5) Miscellaneous Estimates

(6) Public Accounts

(7) Statutory Instruments

Former NDP leader Donald C. MacDonald reports that these efforts have failed to improve the efficiency and effectiveness that were intended to be the hallmarks of standing committees. A good deal of the blame lies in the fact that the Standing Orders do not permit a committee to deal with any matter not specifically referred to it by the House. (Note: This does not apply to the Statutory Instruments Committee.) This Order allows the government to keep a tight rein on the activities of the standing committees. The result however has been that, whereas in 1966, 44% of the bills introduced were referred to committees, by 1972, this figure had dropped to 10%.[4] Furthermore, while standing committees are responsible for such important aspects of government as refining policy and scrutinizing delegated legislation, the fact is that their recommendations to the House are not binding (and are often ignored). Reports are rarely long analytical works. Although skeptics would say that these reports will never have legal authority as long as standing committees espouse a 'less formal, more objective' style, others point to the standing committees' role in providing a forum for informed public discussion. Occasionally too, a critical report can become a thorn in the government's side. The strength of the governing party, as it is mirrored in the representation on the standing committees, is of course central to the nature and content of committee reports. While it is clear that a Standing Order which demanded that such reports be debated in the House would enhance the role of the standing committees, this would also escalate the committee process irrevocably into a solely political battle. It is hard to believe that the parts are much

less factious than the sum. Indeed in some cases the standing committees become microcosms of the partisan politics of the House.

Nevertheless, there is good evidence that the committees can serve some positive purposes.

First, they can repair the imbalance created by a strong executive branch by strengthening the role of the legislative branch. Participation provides backbenchers with a raison d'être. Involvement on the committees requires some commitment by the member to develop an expertise in the area, this largely because the activities of the committees so often centre on the testimony of experts - civil servants and others. This means that members cannot get away with idle talk. What they say should be factual because it will be challenged. At its best, then, the proceedings of a standing committee can be a productive meeting of the minds, wherein speechmaking gives way to meaningful questions and informative answers. At its worst, the work of these committees can become disjointed and inconclusive when members act only for their own constituency or ministry interests. While standing committees have the power to send for persons, papers and things, in the final analysis the ability of a committee to translate powerful information to the House depends on members who are willing to do their homework properly.

This of course means that not only government but also Opposition members must be cooperative. Regular attendance at meetings is important. This is a problem because of the aforementioned practice of shifting members, especially good ones, within sessions. This discourages the development of expertise and is no doubt disruptive to the work of the committee. However, the willingness and ability of members to do the work is even more vital. Again, the dilemma of party politics rears its head. To an Opposition critic bent on "dumping" the government, the prospect of toiling hard for what will be identified as government policy, the set-up holds dubious

attraction. On the other hand, the fact that the workings of these committees rarely receive much attention from the press and the public may mitigate against this uncooperative attitude on the part of Opposition participants.

The committee system needs a more affirmative commitment on the part of the staff of the Clerks' offices who, like the members they support in committee, are sometimes more tied up with business of a more politically visible nature. These staff members must be capable of research in addition to administration.

Commitments by politicians and bureaucrats alike reflect most deeply on the expertise problem. This is especially acute in cases where members sit on more than one committee. Such responsibilities, when added to the politician's constituency duties, may squeeze a backbencher seriously to the detriment of the time and attention he can devote to the House. Thus, while the standing committee model might provide a platform very suited to streamlining the parliamentary process while at the same time strengthening the role of legislators, it is also a structure with pressures of political and administrative exigencies: insufficient time for most representatives to develop expertise (either because of other commitments or high turnover), poor staff research and support, and a replication sometimes of the same attitudes of confrontation which exist in the House.[5]

The political concerns reveal an interesting admixture: on the one hand, the work of standing committees rarely attracts attention by the press or the public; on the other hand, we see that committees, despite their claim of objectivity, can be used as political platforms for the constituent or partisan concerns of members. Thus,a review mechanism which can afford its participants the opportunity to depart from the adversity of the House into the business of serious productivity, often becomes embroiled in the same style as its

parent body. Perhaps the dilemma faced by Opposition members of standing committees is therefore more pointed than in the House. Whereas in the latter forum adversarial relationships are expected (and oftentimes encouraged with a gusto), in the standing committees there is the facade of cooperative hard work. This can present the Opposition member with the difficult choice of helping to improve the legislation and administration of the government which it hopes to defeat or being seen to be obstructive and 'typically Opposition' when in committee. If he chooses the former attitude he must try to gain press recognition for his sense of duty and public-spirited work. If he chooses the latter, he can take up a lot of people's time in bludgeoning government policy. Yet, the press is sometimes difficult to praise 'do-gooders', especially those working away from the spotlight of the House. Journalists are curiously easier to find when there are problems among politicians.

This raises the question of how satisfying standing committee work can be. The success of this type of legislative review depends a great deal on this factor. The Royal Commission on the Legislature (the Camp Commission) said that the incentive to participate in committees will rely on the amount of time they command and the quality of the interaction which emerges. The quality, in turn, will be a function of the topicality of the tasks of the committee and, of course, of the partisan advantages to be gained or lost. The Camp Commission was skeptical about the tradeoff between partisanship and the incentive to develop cooperative expertise. The Fourth Report observed that the former prevails except for some occasional displays where a common expertise and application to complex problems overrides.[6] Another important factor is the perceived efficacy of the efforts: whether or not members see as a future prospect that the government will take action on

the reports of the committee. Sometimes such reports are given a rather low priority - or not debated at all - because of the exigencies of the day. Again however, the acceptability of committee reports may be a function of the extent to which the government's will may be imposed on the document. This is probably easier to achieve in a majority government situation. Political scientist John B. Stewart's book on committee activity at the federal level indicate evidence in 1969 that cabinet ministers do try to interfere, that MP's were instructed on how to vote in the standing committees and that they were asked not to make changes in the bills put before them.[7] Of course, a lot depends on the role that the chairman takes in committee: whether or not he is neutral in providing leadership; whether his choice of consultants/counsel is acceptable to all participants or blatantly biased. This of course is a tricky business. It would be difficult to find experts who are acceptable to all parties. What sometimes happens is that each party is allowed to name an expert and that some consultation is done on a confidential basis. This leads to the problem of who experts work for. If the chairman assumes an overbearing style of leadership, then the consultants/counsel can wind up working for him, thus adding strength to the government side of the proceedings. Then too there is the risk that consultants and counsel can take over the work of the committee members. It is up to the chairman of the committee to ensure that this does not happen. He must encourage members to attend meetings regularly (a quorum being in most cases a simple majority) and to take on the responsibilities of reading and preparation of questions and comments during those meetings.

Another problem that committees can face emerges from the expert witnesses it calls. When a wide variety of affected interests participate in the presentation of briefs there is the opportunity for free and fruitful exchange. What predictably happens, however, is that the better organized

a group is, the more likely it is to present a forceful argument to the committee before which it is making its case. This is not to say that the arguments of richer, older organizations are ipso facto more thoughtful or convincing; it is only to say that some will be aggressive and others passive in the presentation of views to committees and that this is often more indicative of the tenure of the organization than it is of the relative stakes involved. In fact, presentations to committees are problematic in that the organizations are likely to want to challenge the purpose of and policy behind a bill rather than the details of the bill itself. In this they will often be aided by Opposition members. But the purpose of discussion in committee, which usually comes after first reading, precisely excludes the policy merits and focuses on the details of the bill itself.

Such realities almost virtually exclude the participation of either individuals or organizations who are poorly mobilized and/or lacking resources. These inequities would argue strongly in favour of Professor Michael Trebilcock's dual strategies of providing a consumer advocacy office and awarding costs of participation. Although suggested by Professor Trebilcock for the activities of regulatory agencies, these models might easily be welcome in the legislative arena as well.[8]

Select Committees

Many of the concerns discussed in the above section apply also to the work of select committees. In some cases the process of select committees heightens the problems, while in other cases it mitigates against them.

Select committees of the legislature draw together less than fifteen members to investigate a topic of particular public concern. Because they are

appointed on an ad hoc basis, they are usually highly political in nature, often having been created by a government that has been embarrassed and harassed into doing so. The recent "Elgie/McCaffrey" Select Committee on Health Cost Financing and the Inco Committee are two cases in point. The fact that select committees are often jettisoned on political steam means that they can become a vehicle for much political grandstanding. The media is likely hot on the trail of the proceedings of select committees.

The life span of select committees is usually several months. They often meet during the summer or adjournments of the House which means that members can concentrate efforts better than they can when they sit on standing committees. The focus of concern for a select committee is single and specialized, although of course the terms of reference can require an investigation into several dimensions to the problem. This single-mindedness of purpose adds feasibility to the assignment of the select committee. Because members are focussing on one issue and are at relative leisure to do it, there is a greater chance of nurturing expertise among them. Too, the membership is more likely to maintain continuity because of the short time frame of its work (the Elgie/McCaffrey committee being an exception because Dr. Elgie's Cabinet appointment during the life of the Committee). Select Committees are assisted by stronger staff support than are standing committees, this perhaps reflective of their higher public profile and the political priority attached to them. Though the time period is short for extensive research, select committees are given access to research assistants. A Clerk of the House is assigned the administrative tasks. Moreover, they are aided by expert consultants and legal counsel.

The role of staff consultants must be a difficult one in select committees. Faced with an intimate group of politicians, who either know nothing or think they know everything about the subject at hand, the

consultant's task is to help educate them to a uniform level. There is some added incentive to "do the homework" in the case of select committees: unlike standing committees where there is no stipend for participants, members of select committees receive a per diem rate of $50 plus travel expenses.[9] Select committees often take fact-finding excursions; This means that select committees can be expensive investments in the policy process. For example, the Select Committee on Health Cost Financing, which did not travel, cost a reported $50,000. Of course $50,000, or even $100,000, is relatively little in the short term if the long term results of a committee's report bring about savings in government expenditure, a more equitable justice, or the like.

One sees how the tide can run against successes of this sort. Select committees are highly visible to the media and the public, which makes all actors - politicians and affected interests - highly charged in the proceedings. One doubts that non-partisan objectivity rules the private dealings of select committees as they hammer out their recommendations to the House.

In 1955, Lachlan MacTavish, Q.C. was a legislative counsel for the province of Ontario. He wrote a small book on the subject of select committees that year because the House had just gained fifty-five new MPP's and they had no clear understanding of the nature and practices of select committees. MacTavish's lessons basically hold up all these years later and they are reviewed below.[10]

(1) Select committees are single-purpose bodies, set up by Order of Reference for the consideration of a bill, issue or matter not within the ordinary work of standing committees.

(2) If the Order of Reference does not name a chairman then the clerk will hold an election. The chairman and clerk set the times and places for meetings.

(3) Membership is set at fifteen or less and if one member drops out his party leader is delegated the power to name a replacement.

(4) Standing committees can report from time to time during a session but they terminate at the end of the session. Select committees on the other hand operate in between sessions and terminate after the report has been tabled and dealt with by the House. Select committees cannot sit at the same time as the House without special permission.

(5) Select committees have the power to call for persons, papers and things. They hear submissions from interested parties, consult with officials and experts, take evidence under oath and make inspections.

(6) Select committees differ from royal commissions in that the latter are struck under The Public Inquiries Act and have perhaps three members who are not politicians but judges or noted experts in their field.

(7) Select committees cannot delegate their authority to a sub-committee but they can decide to ask individuals or groups of members to do specific tasks.

(8) As in the standing committees, the chairman of a select committee plays a crucial leadership role. He must maintain order, sometimes amidst the fearsome exchange of competing interests. He should encourage the full and fair participation of members, ensuring that the discussions (or even the speeches) of any one member do not monopolize the progress of the committee's assignment. The chairman holds votes via a show of hands among his colleagues rather than a call for "yeas" and "nays" as in the House. The chairman only votes in the case of a tie.

(9) Members of the select committee decide if they want legal counsel and if so what role counsel will play in the examination and cross-examination of witnesses.

(10) Witnesses can be issued a warrant by the Speaker of the House if they fail to appear or produce requested papers. They can be penalized for such contempt but in exceptional cases the clerk is authorized to pay a fee to witnesses (a per diem plus expenses); this following an order of the chairman and with the authority of the Speaker.

(11) Witnesses can give oral evidence under oath or they can submit written evidence. When giving oral presentations, witnesses must answer all questions unless the select committee withdraws the question or acquiesces to the witnesses' protests.

(12) Members of provincial parliament, whether they sit on the committee or not, are expected to testify voluntarily at hearings.

(13) Select committees are expected but not directed to submit a report on the recommendations agreed upon by the members. The procedure for writing a report varies: in some cases the chairman produces a rough draft and the committee works on changes from this base; in other cases it is the major consultant and/or the legal counsel who write the first draft and hammer out the details with the committee thereafter; in still other instances the committee discusses final resolutions, then the draft is written and then the committee reviews it in detail. What is probably more important than the order of the steps is the process of arriving at a report to which all members of the committee will sign their names. This involves, no doubt, a good measure of posturing and dealing to the point where some select committee chairmen would advocate the filing of not one, but three, reports to the House. Mr. MacTavish strongly advises against the presentation of minority or dissenting reports if only because the House requested a group report and not an individual or sub-group opinion.

(14) With respect to the presentation of select committee reports, MacTavish advised that all transcripts (instant Hansard) and exhibits be appended for the permanent record. Copies of reports are given to all MPP's and printed in the Votes and Proceedings or in the Sessional Papers. Once a report is tabled in the House, that body can do with it as it wants: schedule a debate, move for

its adoption, etc. It would be difficult for the government to appear to do nothing about the recommendations of a select committee. While the months that pass between its creation and its dissolution might serve to cool the tempers that flared at the first, the reality of the problems that created the committee still exist, meaning that any government which chose not to act in some way rather quickly would be making a big mistake: the people (not to mention the press) do not forget that quickly.

* * *

The Royal Commission on the Legislature (the Camp Commission) has been the most recent critical assessment of the committee system in Ontario. The Fourth Report of the Commission recommended an end to select committees, saying that they are a luxury which an overworked legislature cannot afford. The Report suggested that any special studies be handled by standing committees. Given the problems of timing and overwork faced by these committees though, this suggestion seems impractical. Camp suggests a remedial measure whereby standing committees effectively move into the schedules now occupied by select committees, namely summer breaks and other adjournments. The Report is insistent that MPP's not be paid any honorariums for Committee work, saying that this is part of their job and requires no special rewards.

The Camp Commission also advised that committees be able to meet concurrently with the sittings of the House and certainly during interim recess periods. This would require better advance notice of the business of the House. This suggestion raises the issue touched on earlier about the tradeoff of time commitments and attention of a member to the House on the one hand and to the standing committees on the other. Policies such as those of the Camp Commission could force the government to face those choices.

It is submitted that such allowances would do some irreparable damage to the House. While it is agreed that the standing committee system can do much to integrate backbenchers into the policy process, one cannot agree that they should be allowed to conduct their proceedings freely across the schedule of full House meetings. It is suggested that this would strengthen the parts at the serious expense of the whole. In addition, considering the weaknesses in the standing committee system discussed earlier, this is not the ideal solution.

The Camp Report goes on to recommend several structural and procedural changes to the committee system:

(1) It advises the creation of small (8 member) permanent specialist committees to deal with public accounts and the three policy fields including the estimates thereof.

(2) It suggests that large (25-30) member) ad hoc committees be appointed to examine bills. The ad hoc approach would accomodate the already fluid nature of standing committee membership.

(3) It recommends that any agency reporting to the Legislature could have its reports referred to a specialist committee with a one-third vote of the House.

(4) Camp would suggest one more small permanent body for the examination and reporting on the aforementioned petitions; follow-up action for a Minister who has forgotten to keep his promise to another MPP; and the review of reports of the Ombudsman. Camp predicts that the small, permanent committees would be politically attractive to MPP's. The Report states that in the Standing Orders, the committee should be encouraged to file a

report to the House; the House, in turn, should be encouraged later down the line to debate the results actively. The Camp Report stipulates that committees should be able to appoint subcommittees and steering committees from within their ranks.

(5) The committees should be able to appoint staff within certain limits. There should, however, be a clear procedure about who writes the reports and how they will be reviewed in the committee. The Clerk of the House should be empowered to add to or improve the staff serving the committee. The same Clerk should maintain this role over the session or term. There should be better training and a large pool of clerks to service the committees.

(6) Senior officials should be able to give evidence and reply to questions in committee without the presence of the minister. Camp contends that this could be done without undermining the doctrine of ministerial responsibility.[11]

(7) Hansard should record all committee proceedings; these recordings would raise the prestige of MPP's.

(8) There is a need for more committee rooms. Legislative reference and library services also need improving.

(9) Committees considering the business of the House should be allowed to consider the policies embodied in a bill, etc. as well as the form of the document.

(10) Camp would repeal the statutory requirements for a Regulations Committee, saying that the House itself needs to be able to change the structure of committees.

* * *

Except for the last, these recommendations might be attractive with some caveats. Reducing the size of the specialist committees might make them more manageable but it would also heighten the importance of regular attendance by MPP's. One would hope that this recommendation would be accompanied by a firm commitment to the permanency of the membership during the session and to a requirement that members sit only on one committee per term.

The ad hoc and fluid nature of the committees reviewing bills seems to come to grips with reality enough but one wonders how manageable such a large group would be; there is some concern as well that the ever-changing composition of the membership would mitigate against the development of any routine or facility with the review procedure. This would probably demand an increasingly strong role for the clerk and the chairman of the committee. Perhaps MPP's not committed to a specialist committee could put their names on a roll stating area(s) of interest. They could be called to sit in committee when a bill in that area was referred. Only eight or ten members would sit on committees to review bills. This would keep the ad hoc nature of this type of committee but remove the fluid and unwieldy aspects of the Camp recommendations.

The recommendation advising that reports of agencies, boards and commissions of the Ontario government be referred, upon petition of the House, to a specialist committee does not go far enough. The discussion, later in this paper, of the Statutory Instruments Committee will deal with this more fully. For now, suffice it to say that one doubts that without a mandatory requirement for the submission and periodic review of all reports, that there will be much impetus from the political arena to mobilize a one-third petition of the House. The requirement that the small committee to which these petitions

are referred also deal with neglectful ministers seems anomolous and curious.

The attention paid by the Camp Report to the staffing and other resource problems of committees underscores the importance of this dimension of committee work. One idea that seems appealing was outlined in an article by C.E.S. Franks called "The Dilemma of Standing Committees of the Canadian House of Commons".[12] Franks points approvingly to the Parliamentary Centre for Foreign Affairs and Foreign Trade in Ottawa. It is funded jointly by Parliament, industry and labour and is used extensively as a resource by the External Affairs Committee of the Commons. The Centre prepares bibliographies, suggests lines of questioning for hearings and provides a broader understanding and overview of policy to members. This would appear to be an extension of the participatory doctrine that finds favour in the committee system. Research institutes for public policy would seem an ideal source that should be tapped more often by committees of the House.

The importance of the Camp recommendation that there be a review of the policy as well as the detail of matter referred to committee cannot be emphasized enough. To maintain otherwise is to create the facade but hardly the reality of legislative involvement in the policy process.

One issue raised by Camp but not yet addressed here is that of abolishing select committees and assigning special studies to standing committees. While one might want to curb the spending excesses of select committees, I doubt that this change would be more than one "in name only", especially if standing committees were allowed to work during summers, etc., as the Fourth Report suggests. Select committees are appointed to signal that an acute political problem will be dealt with; this also means that the results will be that of compromise and as such, sometimes disappointing. I don't think

that, whatever the mode, we could expect any more. And given that committees - standing or select - are microcosms of the Legislature, we should probably expect no less than what we might call political solutions.

The Cabinet Committee on Regulations and the Standing Statutory Instruments Committee of the Legislature

This section will look at ex ante and ex poste review of regulations in Ontario.

Ex ante Review: The Cabinet Committee on Regulations was established at the request of the Premier in October 1972. Its responsibilities include a review of the regulations (or delegated legislation) eminating from ministries or agencies of the government with respect to the following:

(1) Purpose, need and the statutory authority for each proposed regulation;

(2) The effect of the proposed legislation on the public in general and on particular classes of individuals, associations or organizations;

(3) Whether the regulation is in line with Government policy;

(4) The possible effects of the proposed regulation on other Government programmes;

(5) Retroactive effect of the regulation;

(6) Political considerations, if any;

(7) Any other special feature meriting the attention of Cabinet.[13]

The Cabinet Committee is composed of a Chairman who is a cabinet minister (currently Minister-Without-Portfolio Doug Wiseman), a Vice-Chairman who is a parliamentary assistant (currently Robert Eaton, MPP, Parliamentary Assistant for the Ministry of Transportation and Communications) and all other parliamentary assistants. Participation in the Regulations Committee is part of the requirements of the parliamentary assistants'

appointments. Staff support includes the Registrar of Regulations and a Secretary of the Cabinet Office.

Every proposed regulation requiring approval by the Lieutenant Governor in Council is submitted to the Regulations Committee unless otherwise agreed by a Minister and the Chairman of the Committee. In some "emergency cases" a Minister might secure approval for the more expeditious route of submitting the proposal directly to Cabinet.

The Cabinet Committee on Regulations meets at the call of the Minister; this usually means a meeting every week, except during the summer when meetings are bi-weekly.

Ministries or agencies preparing for a submission to the Regulations Committee would seek advice and assistance from the Registrar of Regulations. He would look at the wording of the proposed regulation and deal in an informal manner with the initiating ministry at this preparatory stage. In the time period before the proposed regulation is actually scrutinized by the Committee, the Legislative Counsel office looks at the vires of the regulation. The Registrar can then affix the seal to the proposed regulation and review an Information Sheet for Regulations which has been appended to the regulation. This Information Sheet is a confidential one-page document and looks like most requisition forms of the government: many questions are asked and there is little space provided for reply. A copy is appended to this chapter. The person preparing the document is asked some general information questions, the most interesting of which is whether or not Management Board approval is required for the regulation. Any proposed regulation which has financial or administrative implications must have the approval of Management Board before going to Cabinet Office.

The Information Sheet asks for some background comments specifying

relevant announcements or meetings with affected interests. It also asks for the reasons for the proposed regulation; whether or not the regulation is urgent; whether or not it is consistent with government policy; and if it affects the public, other government programmes or particular constituencies.

The procedures for filing the proposed regulation and the Information Sheet are very particular with respect to the numbers of copies submitted and the deadline for submissions. The Cabinet Committee meets every Monday afternoon; applications received before 4:00p.m. on the previous Thursday will be on the agenda the following week. While copies of the proposed regulation can contain marginal notes to clarify or to denote the nature of the amendment (if that is all that is being proposed), the Chairman or Vice-Chairman can, through the Secretary, request that the appropriate officials from the initiating ministry or agency attend the Cabinet Committee meeting. Mr. Richardson, the Registrar of Regulations, says that the organization is usually represented by its legal and technical staff.

The Cabinet Committee looks at the regulation "as a package" according to Mr. Richardson. The members are obliged by their terms of reference to determine whether the regulation would constitute an unusual exercise of authority and to examine the political implications of the regulation. Mr. Richardson suggested that this latter aspect can lead to heated discussions. The regulations of the Health Disciplines Board,for example,were subjected to close scrutiny,especially those with respect to professional misconduct and conflict of interest.

If the Committee is displeased with the regulation and unconvinced after the meeting with the initiating ministry or agency, it can send the regulation back for revision. It is important to note, however, that if a Cabinet minister is adamant that his ministry's regulation be put before

the Executive Council he can override the Committee's decision. The Committee would send a report to Cabinet indicating its reasons for refusing the regulation.

If the Committee agrees that the regulation should be approved, the regulation is sent on to Cabinet. Accompanying it is a full report prepared by the Secretary. This document, which is confidential, describes the Regulations Committee's comments and recommendations. Since the Committee's Secretary does not attend Cabinet meetings, it is the Assistant Cabinet Secretary who brings the report to the Cabinet meeting on Wednesday mornings of the same week. Since the Chairman of the Regulations Committee, also sits in Cabinet, he can speak to the report if necessary.

If Cabinet approves the regulation it is signed by the Lieutenant Governor. The original copy of the regulation is filed with the Orders-in-Council and copies are returned to the ministry or agency. The initiating organization must file these copies with the Registrar of Regulations in order for the regulation to have force. In order to notify the public, the Registrar then publishes the regulation in the Ontario Gazette within one month of its filing.

The Committee on Regulations prepares an annual summary report which is given to its members and Cabinet. The information is mostly statistical, identifying the number of regulations considered during the year, the number approved and those sent back.

There has been little activity in the way of regulations from the Professional Organizations Committee's four professional organizations. The Registrar of Regulations speculated that if they were submitted to the Committee, members would not be interested in their financial implications since there would be no burden on the public treasury. However, members would be concerned if

the regulation seemed high handed.

It is submitted that the P.O.C. might say something about those matters which a governing body can leave to its rules and those which must be subjected to the scrutiny of the Regulations Committee and the Cabinet. Perhaps, ten years after McRuer, some have forgotten.[14]

* * * *

Ex poste Review: All regulations printed in the Ontario Gazette stand permanently referred to the Standing Statutory Instruments Committee of the Legislature.

The province of Ontario enacted a Regulations Act in 1944. This followed by one year the federal Uniform Regulations Act which required central filing of all regulations of a legislative or public nature and the publication of same in the official Gazette. The Registrar of Regulations was to assist in the drafting and preparation of the regulation and advise on its relationship to the authority of the initiating body. The Ontario statute eventually led to the creation of the Statutory Instruments Committee of today.

Before dealing with that body, it might be useful to provide some historical notes. The current Committee has gone through several previous incarnations which had their roots with the interim recommendations of the Select Committee of the House to Examine into and to Study the Administrative

and Executive Problems of the Government of Ontario (the so-called Kelso-Roberts Committee was the predecessor of the Committee on Government Productivity and the Camp Commission, although the Committee issued only two interim reports and no final report.) In November 1960, the Committee recommended that specific procedures be instituted for the review, public discussion approval and legislative supervision of provincial regulations. The Select Committee said that regulations should be reviewed by law officers of the Crown before being approved by Cabinet. Annual reviews of regulations should be done by a standing committee of the legislature (the Legal Bills Committee was suggested) before which would be an annual report by the Registrar of Regulations highlighting regulations which require special consideration. The Select Committee also recommended that the sittings of the legislative committee for such review be publicized in order to facilitate the submission of briefs from interested parties. The Select Committee did not issue a final report, hence a review of regulations by a standing committee was not instituted. However, in 1961, the Registrar of Regulations, in a memo on the "Supervision of Regulations by the Legislature" to the members of the Legal Bills Committee, reported that "there are no complaints of Ontario Regulations being made without authority and I know of no instance where a regulation has been found by a court to be invalid for lack of authority in the last ten years." However, in 1965, the Royal Commission on the Inquiry into Civil Rights was receiving submissions and the issue of legislative oversight of statutory instruments arose again. At that time, A.R. Dick, now Deputy Treasurer,was Deputy Attorney General. On January 12, 1965, the Associate Legislative Counsel, A.N. Stone wrote to the Deputy about a submission to the McRuer Commission. That letter is reproduced here.[15]

January 12th, 1965.

Memorandum to -

A. R. Dick, Esq., Q. C.,
Deputy Attorney General.

Re Submission to Royal Commission Inquiring into Civil Rights

For some time there has been public concern over the increasing use made of authority delegated by statute to legislate by regulation. The concern is felt mainly for two reasons;

1. The lack of a continuing study by which the public can become informed of the scope of and practice in the use of delegated powers.

2. The lack of public awareness of a consistent policy, established by practice or otherwise, as to how far such powers should be granted or used.

The jurisdictions of the United Kingdom, Australia, New Zealand and Manitoba have established a legislative committee to scrutinize the use made of delegated legislative powers under their statutes. It is appropriate that such a function be performed by the Legislature that granted the powers rather than by an appointed official or board. The final responsibility in a democracy should be assumed by the elected representatives, and any policy established by them in the study and review of regulations would be informed and could be extended to a policy governing the granting of the powers in the statutes. An appointed official or board would be either controlled and therefore subject to suspicion or independent and therefore assuming responsibility without control.

A committee to review regulations was recommended by the Select Committee of the House on Administrative and Executive Problems in 1960 in its interim report on page 11. Such a committee would need by its terms of reference to be confined to the use or abuse of power. Its object would be destroyed if it were used as a means of attacking the policy content of regulations. The committee should have authority to call the officials concerned with administering any regulation to explain their methods and objectives.

A. R. Dick, Esq., Q.C.
Deputy Attorney General.

January 12th, 1965.

It should also receive representation from the public as to hardship or injustice caused by the unnecessary use of power. The committee should have a permanent counsel and be authorized to sit between sessions of the Legislature.

The committee's duties would be:

1. to segregate those regulations in which the delegated power is abused,
2. to segregate those regulations in which the power used is extraordinary or which should be in the Act,
3. to receive representations concerning the use or abuse of delegated powers,
4. to report instances selected to the House after hearing representations by the officials involved,
5. to examine regulating powers in bills.

The committee would report breaches of the following principles whether found in existing regulations or Acts or in Bills:

1. Regulations should not legislate important matters of policy or principle or substantive matters, which should be enacted by the Legislature.
2. Regulations should not have a retroactive application.
3. Regulations should not exclude the jurisdiction of the courts.
4. Regulations should not impose a fine or penalty or shift the onus of proof in a criminal matter.
5. Regulations should not be discriminatory or trespass unduly on personal liberties.
6. Regulations should not delegate an administrative discretion.
7. Regulations should not impose a tax (as distinct from fixing a licence fee).
8. Regulations should not subdelegate powers.
9. Regulations should not amend a statute or define terms used in a statute.
10. Regulations should not adopt documents outside the law by reference.

A. R. Dick, Esq., Q. C.,
Deputy Attorney General. January 12th, 1965.

Some advantages of a Regulations Committee are as follows:

1. The prospect of critical scrutiny by a committee would have a salutary effect in the preparation of regulations, prompting harder work to develop the thought to eliminate unnecessary use of power. At present the burden of confining the detailed administrative methods to the authority granted lies almost wholly with the draftsman and critical scrutiny by the enacting authority is mainly for purposes of the policy involved.

2. The Legislature through its committee members would have a more informed understanding of the existing body of regulations and the problems and practice involved. The committee's accumulated opinions would result in an open, uniform policy in the granting and use of delegated powers.

3. The committee's views on a particularly bad regulation or principle would, in all likelihood, be accepted and corrected by the government of the day without the necessity of reporting to the House, especially if fundamental policy is not at stake.

The Regulations Office in the Attorney General's Department has participated in the drafting of all regulations since its establishment in 1944. That office has succeeded in maintaining a high standard as evidenced by the dearth of judicial decisions invalidating regulations for exceeding their authority. I believe a regulations committee would be welcomed by that office as it would have the effect of supporting the draftsman's objectives.

(A. N. Stone)
Associate Legislative Counsel

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This subject is developed in Parliamentary Supervision of Delegated Legislation by John E. Kersell published by Stevens & Sons Limited in 1960.

The message of ensuring some review capacity over statutory instruments was coming not only from within the government but also from the Opposition as well. Ken Bryden of the NDP told the House in 1967:

> We pass statutes here that give broad powers to other bodies to make laws. These other bodies make laws, often not within the spirit of the statutes passed at all - often, I would say, in contradiction to the spirit of those statutes - and there is no way whereby this House can discharge its duty of supervising the law-making of the province.[16]

Some would say that the absence of legislative involvement in the secondary legislation of the province was a symbol of the government's arrogance. "The problem with the review of delegated legislation is that it is viewed as the Government's rather than Parliament's business, unless one's constituents are involved".[17] The year 1969 changed all that with the naming of the Regulations Committee of the Ontario Legislature. The Committee was provided for by section 12(3) of The Regulations Act (R.S.O. 1970, c. 410). This section was added to the Act in 1968-69 and stated:

> It is the duty of the Committee:
>
> (a) to examine the regulations with particular reference to the scope and method of exercise of delegated legislative power (but without reference to the merits of the policy or objectives to be effected by the regulations or enabling statutes; and
>
> (b) to deal with such other matters as are referred to the Committee from time to time by the Assembly.

The nine Regulations Committees which preceded the one of 1977-78 (re-named in July 1977 as the Standing Statutory Instruments Committee) were beset with problems from the start. They each met only once per session and never accomplished much because all regulations were already a fait accompli. This is still a problem today. The old Committees did not issue reports, with the exception of the fourth Committee

in 1973. During those years there was almost universal dissatisfaction with the operation of the Committee which itself recommended in 1973 that, in view of its limited statutory powers, regulations be referred to it from time to time for a review and examination of its merits. The House did not adopt this measure then and it still has not; this being a major handicap for the Committee.

Both the Camp Commission in 1975 and the 1976 Select Committee on Camp's Fourth and Fifth Reports (the Morrow Committee) concurred that the Regulations Committee be reconstituted so that all statutory instruments would automatically upon their appearance in the Gazette be referred to it for consideration and possible report to the House. Also recommended was a permanent legal staff to help review the large volume of regulations in Ontario.

In 1977, the Morrow/Camp recommendations reached fruition. The new Statutory Instruments Committee was formed. Its terms of reference remained those set out in section 12 of The Regulations Act to which was added an Order of the House on March 31, 1977 which stated:

> It is the duty of the Committee,
>
> (a) to review and consider the role of the Committee with particular reference to the recommendations of the Morrow Committee Report 1975-76 and the practices of the Parliaments of Canada and the U.K.;
>
> (b) to consider the establishment of guidelines to be observed in the delegation by statute of power to make Statutory Instruments and the use made of such delegated power; and
>
> (c) to report its recommendations to the House, and in in addition to the normal powers of standing committees to send for persons, papers and things, it shall have the power to employ counsel and other such staff as the Committee considers necessary.

The new Committee has eight members under the chairmanship of Conservative MPP John Williams. Membership reflects standings in the House with such MPP's

as Bruce McCaffrey and Mel Swart sitting. By virtue of the important power given in clause (c) of the above Order, Lachlan MacTavish, Q.C., the former Registrar of Regulations mentioned earlier, was named counsel to the Committee. Alec McFedries of the Clerk's Office is Clerk to the Committee. The Statutory Instruments Committee has already issued its first report; dated June, 1978 it comes less than a year after the new committee first met. It is the culmination of eleven public meetings, plus three *in camera* sessions to prepare the report.

Mr. MacTavish said that he and Chairman of the Committee meet and set days for meetings, whereupon these dates are cleared by the Clerk through the Speakers Office. The Clerk arranges the committee rooms. The meetings are taped but not transcribed unless requested and ordered by the Committee. This has been done a few times.

My impression from talking to Mr. MacTavish is that the Committee relies on him tremendously. No doubt the man brings the experience of an illustrious career in the field of delegated legislation to his current job (although he is ostensibly retired). One might only question the extent to which the Committee has, ironically, delegated responsibility to its Counsel. Mr. MacTavish looks at every regulation entered in the *Gazette*; last year this number was 975. He "vets" them and reports any materials which appears questionable. He looks at whether or not they are *intra vires*, and examines the spirit and fairness of the regulation, just as does the Cabinet Committee on Regulations. Unlike the latter, it is important to emphasize that the standing committee still cannot debate the merits of the policy implicated in the regulation. This, according to the Clerk, is a domain that the government jealously guards. Not unsurprisingly the *ex ante* and *ex poste* review committees have little contact with each other.

One would think that under the status quo the work of both could be facilitated and enhanced if consultation were on an ongoing basis. The Clerk feels there is some discontent among members of the Statutory Instruments Committee who feel that they are doing little more than rubber-stamping the regulations. This is the most critical weakness of the handling of regulations by the Province; it is one to which I shall return.

This anomoly notwithstanding, Mr. MacTavish is confident that the Standing Committee's role is not just to review regulations but also to improve the system of delegated legislation.

Toward this end and further to its terms of reference, the Committee has studied the practices of delegated legislation in the United Kingdom, Australia, South Africa, India, Manitoba and Ottawa. The Committee endorses the McRuer statements about the need for an ongoing watchdog to scrutinize statutory instruments and ensure that delegated legislation is functioning in the public interest and according to the intent of the Legislature. The criteria set out by McRuer are also seen as important benchmarks:

(a) They should not contain provisions initiating new policy, but should be confined to details to give effect to the policy established by the statute.

(b) They should be in strict accord with the statute conferring of power, particularly concerning personal liberties.

(c) They should be expressed in precise and unambiguous language.

(d) They should not have retrospective effect unless clearly authorized by statute.

(e) They should not exclude the jurisdiction of the courts.

(f) They should not impose a fine, imprisonment or other penalty.

(g) They should not shift the onus of proof of innocence to a person accused of an offence.

(h) They should not impose anything in the way of a tax (as distinct from fixing the amount of a licence fee, or the like).

(i) General powers should not be used to establish a judicial tribunal or an administrative tribunal.

The Statutory Instruments Committee last year called testimony from Deputy Ministers and senior officials. Mr. MacTavish told me he found these people very critical and constructive in their evaluations of the regulations in particular and the purpose and functioning of the Committee itself in general. For example, officials of the Ministry of Education testified on the Ministry's current efforts to review all its regulations in order to simplify and streamline them; this it plans to do on a decennial basis. The idea found favour with the Committee. (A better understanding of the regulatory review was a priority in the year of its re-birth.) The Committee also heard from the Senior Legislative Counsel, Arthur Stone, who was once Registrar of Regulations and from William Anderson who now holds that job. The Committee visited the offices of the Registrar to look at the system of filing, indexing and publishing regulations.

Mr. MacTavish said simply that he has had no occasion to call representatives of the self-governing professions before the Committee, mostly because of the dearth of regulations emanating from that sphere.

The first report of the Committee was published in June, 1978. Mr. MacTavish said the Committee will probably publish reports every several months. Toward that end, the members of the Committee have chosen to look particularly at regulations made under The Niagara Escarpment Planning and Development Act of 1973, The Planning Act, The Health Insurance Act and The Conservation Authorities Act. The first report dealt with contentious regulations thematically, raising issues and citing the guilty acts and statutory instruments.

The report addressed issues such as the complexity and diversity of statutory definitions of the purposes of regulation. The Committee also expressed a strong desire that the statute and not the regulation should define the basic key expressions of purpose. Statutory instruments, members reminded the Legislature, should supplement, not lead.

The report notes that statutes are irregular in the mode of authorization to make regulations. The Health Disciplines Act, for example, says that "subject to the approval of the Lieutenant-Governor in Council and with the prior review of the Minister the Board may make regulations. The Professional Engineers Act states:

> s.7(2) No regulation is effective,
>
> (a) until it has been submitted to the members for approval by means of a letter ballot returnable within thirty days after the mailing thereof and it has been approved by a majority of those voting within the prescribed time; and
>
> (b) until it has been approved by the Lieutenant Governor in Council. 1968-69, c.99, s.7.

The Committee also felt that legislation should make it clear that authority delegated by the House to the Cabinet should be unencumbered, and that in the cases where another authority can make regulations, the Executive Council should maintain control by requiring its approval or providing for the use of veto power.

> The Lieutenant-Governor in Council should be in control in all cases and at all times, because the Government has the ultimate responsibility to the House and through the House to the people. Such is our system of responsible government.[18]

The Committee expressed the opinion that the act and not the regulations should specify penalties for the contravention of either.

Members also raised the fact that there are exemptions to the requirement that all regulations be filed and published in the Gazette.

Regulations must be specifically exempted from review in their act and exemptions exist in The Municipal Affairs Act, The Teaching Profession Act and The Ontario Highway Transport Board Act, to name a few examples. Exemptions are given when (a) the subject area is not of general public interest, (b) when other requirements ensure that the regulation is on file elsewhere and is easily accessible to the public, (c) when the bulk of materials is greater than the benefits of public filing, (d) when there is a need to act quickly, or (e) when the time, money and effort of filing outweighs the public benefits.

The Committee dealt with the matter of retroactive legislation saying that it agreed with McRuer that statutes and regulations should have a retroactive effect unless this intent of the Legislature is clearly stated and unless a bottom-line date is stipulated.

The Statutory Instruments Committee has not had the time to examine regulations before 1977. The Committee felt that an examination of these would be unnecessary because of their age and impractical because of their great numbers. Yet the Committee did single out some pre-1977 regulations and found them to be in order. The members reported, however, that if any criticism could be levelled at any of them it would be in the area of policy and therefore outside the terms of reference of the Committee. Of the 975 regulations in 1977 (emanating from 138 statutes), 300 were made under the authority of The Planning Act, 90 under The Parkway Belt Planning and Development Act and 74 under The Highway Traffic Act. This gives rise to a question being considered by the Committee that it is perhaps redundant to publish these regulations under the requirements of both the Regulations Committee and their organic acts.

The Committee found one incidence where regulations were made

without proper statutory authority and another where the regulation was not sufficiently descriptive.

The Committee criticized regulations that prescribe powers (of people, boards, etc.) when they should be confined to duties. It also admonished acts which don't distinguish clearly between rules and regulations, a problem discussed earlier.

After having examined the 1977 regulations for (a) form and substance, (b) the regulatory authority of the statute and its amendments, and (c) their adherence to the McRuer principles the Committee concluded that:

> We have found nothing that would give concern to the members of the Legislature. In our opinion the system in place here in Ontario is basically sound and is being administered in a satisfactory manner.

The Committee's recommendations discussed above belie this conclusion as they are summarized in Appendix B.

* * *

Developments in certain other jurisdictions have failed to show much initiative in rationalizing the review of statutory instruments. In Alberta, for example, the Minister of Education, Dr. A.E. Hahal presented the Policy Governing Future Legislation for the Professions and Occupations in May of 1978. His introductory statement to the House was rather promising. "The public interest is best served by an effective balance between self-regulation by professional and occupational groups and the government's capacity to ensure quality standards."[19] However, the report says little more than that every self-governing profession must submit an annual report through its Minister to the Legislature and that minimum common standards for content and format will be developed. Regulations will require Executive Council approval and will be published

in the Alberta Gazette. The Minister told the House that "The government is adopting this policy as a set of guidelines to review existing legislation and consider requests for new legislation for professions and occupations".

In Britain recently, the government recommended new watchdog committees along the "shadow cabinet" structure of yesteryear. These committees would have the power to call for persons, papers and records, and could acquire consulting staff. But the move to a shadow cabinet model would seem to obscure the need for overview of statutory instruments.[20]

* * *

It is suggested that a strong case could be made for providing the Standing Statutory Instruments Committee with the power of ex ante review of delegated legislation. The Committee has shown, in its reconstituted form, an ability to analyze regulations with a view to making recommendations that would improve their format and their adherence to basic principles of statutory instruments. As it stands now, the Committee has little clout which could be enhanced by allowing it to examine proposed regulations rather than "Gazetted" ones. Furthermore, it is disturbing that the Statutory Instruments Committee has little contact (except at the start of this inaugural year) with the Cabinet Committee on Regulations.

Yet the Statutory Instruments Committee seems capable of providing an overview of secondary legislation that has been absent from the Cabinet Committee on Regulations. Surely this review process should come before the regulations are approved, not after. This is a shortcoming felt most strongly by the Statutory Instruments Committee and one on which it plans to comment at a later date. The Committee is considering introducing a proposal for a committee of the House whose function it would be to examine

all regulations before they are approved in order to ensure that the powers to make regulations that the Legislature has delegated to others will be exercised in the manner intended by that parent body. This is a measure which I would wholly endorse. It seems to me that a stronger conception of the implications of regulations can only be gained if the executive and legislative branches work in unison. And while one cannot deny that the executive branch has every right to deal with the policy bases and impacts of regulations at that level, it is the pervasive (but pragmatic) dilemma of standing committees that this right precludes them from so studying as well.

There should be no reason why draft regulations could not stand referred to the Statutory Instruments Committee in the same way as bills are referred to the standing policy field committees. Both would be "vetted" by the appropriate Cabinet committee beforehand. The responsibilities of the House to its instruments of delegated legislation should be taken as seriously as those to its primary legislation and the government of the day should ensure this is so.

Reviewing Dr. Peter Aucoin's recommendations in his working paper for the P.O.C. in the light of the above discussion:

(1) Dr. Aucoin states that "it is necessary that the capacity of the executive to review and evaluate the policies of self-governing agencies be enhanced. This entails, at a minimum, three developments":

(a) professional organizations must submit annual reports to the Lieutenant-Governor in Council, to the House and to the Statutory Instruments Committee;

(b) all professional statutes should have a provision, like the one in The Law Society Act, that the Attorney General may at any time require the production of any document, paper, record or thing pertaining to the affairs of the Society (Section 13(1));

(c) a review and evaluation agency should be established within the executive branch for providing Cabinet with an assessment needed if it is to exercise its responsibilities vis à vis the professions. This agency should serve the Regulations Committee of Cabinet. Dr. Aucoin speaks of this review and evaluation agency as having capacities to conduct research, analyze data and answer complex, political questions.

(d) The Statutory Instruments Committee should have the staff to question the review and evaluation agency and the professional organizations. The Standing Committee should report annually to the House on the proceedings of the above investigation. Dr. Aucoin would give the

Statutory Instruments Committee broader powers than it now has in terms of reviewing the policy and administration of professional organizations as revealed in its annual reports as well as the mere form of its regulations.

(e) Dr. Aucoin would insist that all regulations require the approval of Cabinet and that they be published in the Ontario Gazette. He would clarify and enforce the differentiation between regulations and rules.

In view of the paltry flow of regulations emanating from our four professions in the past several years, this latter recommendation might be the best place to start. There is no sense setting up another layer of bureaucracy without need. While a stricter definition of rules and regulations might stimulate the flow of regulations, I agree with Aucoin that this requirement must be coupled with one for the mandatory submission and review of annual reports. To ignore this factor is an abrogation of responsibility. This must be accompanied by a detailed list of what must be reported in the annual submissions, as Alberta is now creating. I am not certain that even this flow of information to the executive branch would require a full-blown review and evaluation agency in that arena, unless of course all agencies, boards and commissions of Ontario were involved. Perhaps this is what will become of Doug Wiseman's Agencies Review Committee which is now working at the executive level to review the list of agencies, boards and commissions in this province.

Dr. Aucoin's scheme of then subjecting the work of a review and evaluation agency and the professional organizations themselves to the scrutiny of the Statutory Instruments Committee seems elaborate but it would be the only choice given the current structure of these two committees.

At least this suggestion would ensure the communication that should rightly exist between the two bodies.

It would be much less cumbersome if both regulations and annual reports could be scrutinized by one committee only: the Statutory Instruments Committee. This volume could probably be handled by the current Counsel plus one or two research assistants. This suggestion would maintain in the proper arena the Legislature's responsibility for its delegated legislation. However, this ignores the politics of the matter.

An intermediate position might be for the Cabinet Committee on Regulations to submit annually to the House a report of its own on the statutory instruments and annual reports examined. It would then require a one-third petition of the House to refer any troublesome aspects to the Statutory Instruments Committee who would then have to conduct a small study on the merits and issue a report. This would be in addition to -not instead of-the Standing Committee's normal review of the form of statutory instruments. This overview would be spotty and the development of expertise would therefore be slow, but at least the Legislature would be involved in a manageable way.

FOOTNOTES

1. K.C. Wheare, Government by Committee, quoted in J.R. Mallory, "The Uses of Legislative Committees" in Canadian Public Administration, Vol. VI, No. 1, March 1963, p. 2.

2. Canada. Special Committee on Statutory Instruments, "Delegated Legislation in Canada" in W.D.K. Kernaghan and A.M. Willms (eds) Public Administration in Canada: Selected Readings, 2nd Edition (Toronto: Methuen, 1971), p. 406.

3. See C.E.S. Franks, "The Dilemma of the Standing Committees of the Canadian House of Commons" in Canadian Journal of Political Science, Vol. IV, No. 4, December 1971.

4. See Donald C. MacDonald, "Modernizing the Legislature", in Donald C. MacDonald (ed) Government and Politics in Ontario, (Toronto: MacMillan of Canada, 1975).

5. See Jeffrey Simpson, "Set up of House Committees makes Progress Difficult" in Globe & Mail, August 3, 1978.

6. See Ontario Royal Commission on the Legislature, Fourth Report, (Ontario: Queen's Printer, 1975), p. 64.

7. See John B. Stewart, The Canadian House of Commons: Procedure and Reform (Montreal: McGill-Queen's University Press, 1977), p. 173.

8. See Michael J. Trebilcock, "The Consumer Interest and Regulatory Reform", in G.B. Doern (ed.), The Regulatory Process in Canada, (Toronto: MacMillan, 1978).

9. In 1955 this rate was $30.

10. L.R. MacTavish, Q.C., Legislative Counsel, Select Committees: A Summary of their Functions and Practices in the Legislative Assembly of the Province of Ontario, (Toronto: Queen's Printer, 1955).

11. Ontario Commission on the Legislature, Fourth Report, (Ontario: Queen's Printer, 1975).

12. See supra, note 3.

13. Ontario Committee on Regulations, mimeograph, September, 1977.

14. The information on this discussion was derived from supra note 13, plus my conversations with Mr. W.R. Anderson, Q.C., Registrar of Regulations and Mr. Alec McFedries of the Clerk's Office.

15. This letter and several other references discussed here are contained in: Ontario Standing Committee on Statutory Instruments Support Materials, Volumes I, II and III, 1977-78, mimeo. They were assembled by Mr. Lachlan MacTavish, Q.C., Counsel to the Committee.

16. Hansard, January 26, 1967, reproduced in supra note 16.

17. Paul Byrne, "Parliamentary Control of Delegated Legislation" in Parliamentary Affairs, Vol. XXIX, No. 4, Autumn 1976 in supra note 16.

18. Legislative Assembly of Ontario, Second Session: Thirty-first Parliament, Standing Committee on Statutory Instruments, First Report, June, 1978.

19. Alberta Hansard May 16, 1978. Statement by Dr. A.E. Hahal, Minister of Advanced Education and Manpower.

20. See Robin Gordon-Walker, "More Power Recommended for Commons Watchdog Committees", Press Notice obtained via British Consul General, August 4, 1978.

APPENDICES

A. Information Sheet for Regulations

B. Summary of Recommendations in First Report of Statutory Committee on Statutory Instruments

Information Sheet for Regulations

APPENDIX A

Date Prepared: February 10, 1974

Ministry	Branch
Revenue	Legal Services

Prepared by	Telephone No.	Management Board Approval Required
G. Stoodley	5-6269	[x] No [ ] Yes

1. Act (Title and R.S.O. Ref.)

The Corporations Tax Act, S.O. 1972, c. 143

2. Title of Regulation

Insurance Corporations, O.R. 350/73

3. Background Comments (e.g. Ministry Announcements, Meetings with Special Interest Groups, etc.)

4. Reason(s) for Proposed Regulation

1. Maintain uniformity with the Federal Income Tax Act, as recently amended;

2. Provide for a better method for the allocation of taxable income of insurance corporations that are resident in Canada and that do not carry on a life insurance business.

5. Type of Submission	Type of Textual Change
[ ] New [x] Amended (Explain) ▶	[x] Word(s) [ ] New Paragraph(s) [x] Numeric [ ] Section [ ] Clause [ ] Sub-section [ ] Sub-claus

6. Urgent — If yes, explain

NO

7. Consistent with Government Policy — Explain

[ ] No [x] Yes

8. Affects Public — If yes, explain

NO

9. Affects Other Programs — If yes, explain

NO

10. Retroactive — If yes, explain

Sections 1 and 3 would be retroactive to conform with The Income Tax Act (Canada) which would make the provisions effective Jan. 1/7

11. Unusual or Unexpected Use — If yes, explain

NO

12. If Applicable, Name Riding(s) Affected

NO

13. Other Considerations

NO

CONFIDENTIAL DOCUMENT

APPENDIX B

SUMMARY OF RECOMMENDATIONS IN FIRST REPORT OF STATUTORY COMMITTEE ON STATUTORY INSTRUMENTS

2(1) As a general rule, the authority of the Lieutenant Governor in Council to make, approve or veto regulations should be unencumbered.

(2) The authority of any other person or body to make regulations should be subject to the approval of, or the right to veto, of the Lieutenant Governor in Council.

Report, page 16.

3. Important, key words and expressions used in an Act, should, if they require definition, be defined in the Act, not in the regulations.

Report, page 20.

4. The authority to impose penalties for infractions of an Act or the regulations under the Act, and the sanctions for such infractions, should be in the Act, not in the regulations.

Report, page 21.

5. All exemptions from The Regulations Act that are not now set out in the Act should be transferred to the Act.

Report, page 29.

6(1) Express authority for giving a regulation retroactive effect should be written into the Act.

(2) Such an authorizing provision should specify a date back of which the retroactivity must not go.

Report, page 38.

7. Reliance should not be put upon descriptive language as authority for taking action or making a regulation. Specific authority for so doing should be provided.

Report, page 44.

8. Powers, as distinct from duties, of a public body or official should be set out in the Act and not left to be prescribed in the regulations.

Report, page 45.

9. The use of the expression "rules and regulations" in the sense in which it is used in The Small Claims Court Act should be discontinued.

Report, page 46.

10. The authority to make regulations creating exemptions from an Act should be used only where and to the extent necessary.

Report, page 47.

11. Every Act that authorizes the making of regulations should state whether they are or are not to come within the scope of The Regulations Act.

Report, page 47.

12. The Regulations Act and Regulation 781 made under it should be reviewed and updated in the light of experience.

Report, page 50.

13. Every ministry, agency of the Government, and other organizations that administer regulations should examine their current regulations with a view to updating them, simplifying them in substance and in form, and removing obsolete provisions.

Report, page 51.

14. The manner in which compound references in the regulations (and in the statutes) are expressed should be simplified by the adoption of a style that can be more readily comprehended.

Report, page 53.

III. ADVISORY BODIES

Turning now to advisory bodies, we find that this model is neither as sporadic as Sunset or select committees nor as narrowly conceived as the standing committee discussed in the above section. Advisory bodies can become an ongoing source of innovative input to the policy process. On the other hand, they can be little more than window dressing set up to deflect attention from the real actions of government.

Advisory bodies are created to advise ministers in particular and governments in general on specific areas of policy concern. They are often (but not always) a formalized method of non-government participation in public policy.

The success of an advisory body can depend on:

(a) The composition of the council (i.e. is it composed of representatives of a wide variety of interests?);

(b) the priority given the advisory body by the minister;

(c) the perceptions that staff bring to the administration of the body.

Some advisory bodies become strong critics of government while others become focal points for action among affected interests. Still, the scope and efficacy of advisory councils will be a function of the personalities involved, and the institutional guarantees they build into the structures. This in turn generates the prestige and political clout of the councils.

There are traditionally three ways of casting the membership on advisory bodies:

(1) an internal group of officials gathered on a departmental or interdepartmental basis;

(2) a formal external body which gives recommendations at the end of its ad hoc existence (royal commissions come under this heading);

(3) a representative advisory committee with a deliberately structured membership taken from outside the mainstream of the bureaucracy.

Advisory bodies may also be labelled as:

(1) Functional advisory bodies: which offer advice and determine policy within a specific area of delegated jurisdiction and administer the programmes and activities they establish. Such advisory councils have more at stake insofar as they have their own establishments and programmes to protect and develop. Examples of functional advisory bodies are the Medical Research Council and the National Research Council;

(2) Central advisory bodies: are public forums created by government to offer criticism and advice on its own programmes. Examples at the federal level would be the Economic Council of Canada and the Science Council. The former, for example, offers advice both to government and the private sector, conducts research, participates in research and publishes reports.

At the provincial level in Ontario, advisory bodies are wont to be in the form of royal commissions which have proliferated of late. Two examples of representative advisory bodies which will be examined in detail

here are the Ontario Council on University Affairs and the Advisory Council on Occupational Health and Occupational Safety. These advisory bodies are not located at the centre of the government but at the centre of their reporting ministries (Colleges and Universities and Labour respectively) and have direct access and responsibility to the minister involved.

While advisory boards offer more specialized expertise, greater flexibility and a wider base of participation than could be found in the bureaucracy, some critics would say that they are set up as a symbol to prove the government's concern about an issue more than as an indication of its commitment to action in that area. This of course is the traditional view of royal commissions. But with such dynamic and effective advisory councils in Ontario as the Council on University Affairs and the Ontario Economic Council, this generalized criticism seems absurd.

This discussion will focus on advisory councils which are more permanent than the royal commission/task force prototypes. These are the advisory bodies created, ostensibly, to inject new ideas, knowledge and opinions into the policy process on an ongoing basis. Perhaps, though, there is a not-so-hidden agenda, revealed in this statement from a Management Board Secretariat document:

> [Advisory councils are] intended to improve the quality of the government's policy decisions and at the same time assist in the acceptance of its actions by some of the groups most interested in the policy area.[1]

It is for this reason, suggest Van Loon and Whittington,[2] that some affected interests are reluctant and suspicious to participate in advisory bodies: reluctant, because they fear they will lose their right (or at least their credibility) to criticize government policy; suspicious because they imagine they are being hired not to contribute towards policy but rather to explain government's policy decisions to their constituencies. Such feelings could

become more acute among advisory councils with no programme implementation power, which is to say most advisory councils. Their strength is their knowledge and it is a specialized knowledge at that. Their power therefore lies in their ability to bring a broader range of people and alternatives into the policy process of government, to test or gain acceptance of policies on affected interests, to inject a countervailing force on the civil service and to provide a conflict/problem-resolution mechanism that is one step removed from the minister.

Some central advisory councils are more successful than others in translating their knowledge into power. As was stated, this is often a function of the personalities and institutional guarantees involved. It is to the government's credit when its advisory councils are filled with men and women of sterling credentials, people for whom it is not overwhelmingly in the government's vested interests to choose (although certainly some appointments are made via the patronage route). The government's fear in this regard must be that their 'supply' of good people will wear thin as the number of appointments increases. Appointees are ideally aided by clear and precise terms of reference, scope of jurisdiction and reporting requirements. Some advisory councils, through their work, develop quite an independent and visible identity, especially among their constituencies. Others have developed in what has been called "splendid isolation", declaring their responsibility to the Legislature rather than the minister, and becoming more closely linked to their constituencies than to the ministers they serve. This demands that a strong positive relationship and line of accountability be maintained between the advisory council and its minister. It is the duty of the latter to ensure that the advisory council, while independent in its advice, is at the same time fully apprised of and familiar with ministry

policy in all areas: this is the only way that council advice can hope to be informed and timely (although not necessarily conformable).

There are several ways in which a minister can exercise control over an advisory council. Initially, this is done by his having a say in the appointments that are made to it. While there is evidence of patronage and the old-boy network at play in these appointments, many advisory councils are composed of first-rate people, experts in many fields, who apply and develop that expertise in their new jobs.

Ministers can also exercise power over advisory councils through criticism of or failure to act on their recommendations and annual reports, persuasion, and, ultimately, through the budget. And their lives are further tested, largely by these same tools, by the Opposition.

It is this very precariousness that heightens the unique needs of advisory councils. In order to succeed, they need full access to all relevant documents of the government in order to make decisions, they need complete freedom to publish in order to affirm their independence; they need the support of the minister in order to ensure the appointments of independent thinkers and they need staff that are supportive and capable. The credibility of councils will be enhanced if they display a willingness to support the minister actively as well as to criticize. Finally, advisory councils will be judged not only by their legislative outputs but also by their ability to facilitate and raise the level of public discussion and debate. To some extent, the impact of this is dependent on whether or not its voice is the only reasoned one being heard on the subject. Thus, advisory councils serve this residual educative/stimulative purpose. The long-term benefits of this will be better informed affected interests and wiser politicians.

In order to maximize its efficacy vis-a-vis government policy and its educative role vis-a-vis the public, the advisory council must display

exemplary self-discipline. It must stay within its terms of reference as set out by the government and the particular minister to whom it must answer: in this way it increases its chances of being heeded and develops a specialized expertise. If its terms amount to a scanning role of an area it must be careful not to "wander into the totality of social problems".[3] Bruce Doern expands on this theme:

> While the [Science Council] has been preoccupied - indeed almost mesmerized - by the interrelationships of everything to everything else, and while it has concentrated on the long run, it has faced great difficulty in determining the boundaries and the strategies of its role in the short run, the time frame in which the politicians must act, and the time frame in which decisions will be made. This is the fundamental policy dilemma of central advisory bodies.[4]

It is incumbent upon advisory bodies very quickly to gather a firm self-confidence about their role in policy-making; to view themselves as means to an end, rather than the end in itself. And to be prepared to give advice before all the evidence is in.

Tom Shoyama,[5] now Deputy Finance Minister, has summarized the reasons that governments create advisory bodies :

(1) In many cases the government may be genuinely puzzled as to the best course of action and is sincerely searching for competent advice.

(2) At times technical expertise may be required.

(3) Frequently what is required is an informed, shrewd feel for the probable reaction of the public to existing or proposed policy.

(4) Sometimes a government wants to have greater participation from those directly affected by a policy and so they recruit representative citizens to an advisory committee to have a part in policy development and its application in administration. When this is the case, action is often based on a firm belief that this is an important element in what is considered

the essential two-way communication between government and public.

(5) Coordination may be the goal in setting up an advisory council.

(6) It may be seen as a technique to overcome resistance. A government may use the advisory council to overcome resistance of a particular group to its view by marshalling sympathetic outside forces in the common forum provided by the council.

(7) It may be expected to perform an administrative function.

(8) The government may draw on the special knowledge and contacts of people by assigning an advisory committee particular tasks of inquiry and study.

(9) A more negative function of advisory councils or committees may be to contain public pressure, delay action, pass-the-buck, shelve responsibility or disarm the political opposition.

(10) Another possible function, if government thinks it should support its own critics, is that of an ongoing critical review of existing policies and programmes.

(11) They may be set up to overcome the danger that a few pressure groups may monopolize access to the department or ministry.

To this we might add:

(12) People identify strongly with and perform better in programmes they have helped to plan.[6]

In the sections that follow, we will look at two advisory councils which embody many of the more positive rationales for creating such structures. They also manifest the more favourable dimensions of advisory bodies, not least of which is that, to turn a phrase, 'when they talk, people listen'. The two advisory bodies reviewed here are: (1) the Ontario Council on University Affairs; and (2) the Ontario Advisory Council on Occupational Health and Occupational Safety.

* * * *

Ontario Council on University Affairs

The Ontario Council on University Affairs (OCUA) began its life on

September 25th, 1974 as "Ontario's independent advisory body with respect to universities and certain other post-secondary educational institutions".[7] Its First Annual Report was issued five months later, on March 1st in order to re-align its operations more closely to the government's fiscal year.

From its inception the Council seemed certain about its role, its goals and the modus operandi for accomplishing both. Such confidence and clarity are sometimes lacking in advisory bodies, especially during their initial years. In the case of OCUA, however, one suspects that, because of some excellent commandeering by its first Chairman, Dr. J. Stefan Dupré, this advisory body was able to avoid some of the pitfalls plaguing other new advisory councils.

Dr. Dupré was accompanied in that first year by such distinguished people as John J. Deutsch, Fraser Mustard and Reva Gerstein. The twenty members of OCUA represented a range of geographical points across Ontario and a variety of interests and expertise.

Although there has always been an attempt to draw representation from a cross-section of Ontario, this has been done on an informal basis. The first OCUA council included members from Toronto, Hamilton, Guelph, Kingston, London, Thunder Bay, Cornwall, Sudbury and Ottawa. The fourth council in 1977-78, had members also from Georgetown and Sioux Lookout but not from Thunder Bay. Dr. William Winegard, the current Chairman, pointed out to me that there are perhaps more women on OCUA than one has yet to find on other government bodies: in 1974 women composed 25% of OCUA membership and in 1977, this figure had risen to 35%. Dr. Winegard suggested that this fits with the efforts in the universities to level out salaries as between male and female faculty and staff, and generally to promote equality.

The terms of reference of the OCUA do not specify the composition

of the body but Dr. Winegard explained that the history of the past four years has evolved a guideline. All appointments are made through the Cabinet machinery and are for three-year terms, which are renewable. Appointments are ratified by Order-in-Council.

(1) Six members are drawn from the university community, four usually from faculty. Although no particular discipline is more desirable, there is an attempt to distinguish between science and non-science representatives. There is representation from university staff and there is always a student on Council.

(2) Some representation is drawn from business. This does not mean that the candidates all need be presidents of Massey Ferguson or the like, Dr. Winegard warned. What is important though is that the chosen members are used to dealing with large organizations and are not intimidated by the $1 billion in government funds which OCUA must recommend for allocation annually.

(3) Labour is also represented on Council because of the need to bring in a different point of view. Dr. Winegard suggested that the type of labour representative sought out would be one who would promote accessibility of education regardless of socio-economic background.

(4) A fourth, rather amorphous, area from which the OCUA has drawn representation is the public-at-large. Looking for people who would bring an unbiased viewpoint to the deliberations of Council, the Cabinet has, in this category, named people like retired bishop Rt. Rev. Walter Bagnall. Some members who had once been active in education (e.g. schoolteachers)

would also be considered from this category of "Concerned citizens".

(5) Dr. Winegard speculated that there will always be on advisory councils such as OCUA people who have, through years of experience in and around the particular field of policy, risen to the vanguard of expertise in that area. Thus, the appointments (and re-appointments) of Stefan Dupré, Reva Gerstein, Fraser Mustard and more recently William Winegard.

The staff complement of OCUA in 1974 included an Executive Secretary/Research Director, an Associate Secretary and a Research Officer. Of late the Executive Secretary/Research Director and Associate Secretary positions have been dropped and a Senior Research Officer and an Administrative Assistant serve instead. There are two junior research officers (one having been seconded from Treasury) and one vacancy at this time. Dr. Winegard is not now certain whether he is looking for a researcher to do economic analysis or one who will provide overview capabilities. He is waiting to make this decision based on the research required as a result of the briefs submitted to Council this year from the universities and on the needs of the Minister. The Council, not the Minister, makes these staffing decisions.[8]

The institutional guarantees to which I have alluded were firmly ensconced in OCUA: most importantly, there was provision that all textual memoranda - that is all advisory memos prepared by OCUA to the Minister of Colleges and Universities - be published in full in a report which is published annually. The Council considered this to be a major innovation of advisory bodies and explained the rationale behind the decision to do so:

> Through such memoranda Council seeks to expose the reason that has led it to formulate its more important recommendations to Government. As an advisory body,

> Council is strongly of the opinion that the Government, the university community and the public are best served by full disclosure of the considerations it weighs in formulating its advice. Whether to expose Council's fallibility or demonstrate its sagacity, such disclosure is surely in the public interest.[9]

The OCUA stated at the outset in its First Annual Report that its objectives included:

(1) "the capacity of the university community to make its own contribution to the health of higher education through the most effective deployment of its resources"; and

(2) "the development of its own contribution to enhancing the effectiveness of the university system".[10]

These objectives have been nurtured over the years: each year the Chairman sends a letter to the presidents of the educational institutions within the Council's terms of reference. This letter informs representatives of the matters of special interest to OCUA for the coming year and invites them to address themselves to these issues in the annual brief and in the oral presentations during the public meetings of Council. The first of these letters, from Dr. Dupré, divided areas of interest into: (a) Policy and Planning Issues; and (b) the Financial Outlook for 1976-77. The letter went on to make detailed requests for the facts and opinions of each institution vis à vis such concerns as (c) formula revision; tuition fees; accessibility; student support; and macro-indicators; and (d) budget estimates; impacts of budgets on service levels, and contingency plans for continued fiscal restraint. OCUA held twenty-one meetings with affected interests across Ontario in its first 'five-month year' and twenty-six in 1977-78.

For its own part, Council has certainly developed the perspective and contribution that it hoped for from the start. Besides the

annual budgetary allocation advice that it gives the Minister, OCUA identifies the policy issues, such as those outlined above, which should be considered during the year. While it is the Chairman who sets this agenda, he receives input from the Minister, the universities and Council members. The Annual Reports always list the recommendations of the Council and the Minister's response to them. This tally sheet is a most obvious and useful indicator of the success of an advisory body and OCUA figures very well indeed. The summary of recommendations for 1974-75 and 1977-78 follow:

OCUA Recommendations 1974-75

Recommendation Number	Title	Response
	(Advisory Memorandum 74-I)	
74-1	Five-Year Plan for Graduate Development at Laurentian	Accepted
74-2	New Graduate Programs in Anthropology and Geography at York	Accepted
74-3	ACAP Report on Political Science	Accepted
	(Advisory Memorandum 74-II)	
74-4	Formula Approach for 1975-76	Accepted
74-5	Grant to the Law Society of Upper Canada,1975-76	Accepted
74-6	Grant to the Ontario College of Art, 1975-76	Accepted
74-7	Bilingualism Grants, 1975-76	Accepted
74-8	Supplementary Grants to Carleton, Windsor and York, 1975-76	Accepted
74-9	Supplementary Grants to Brock, Lakehead, Laurentian and Trent, 1975-76	Accepted
74-10	BIU Value Under the Government's Expenditure Target for 1975-76	Accepted
	(Advisory Memorandum 74-III)	
74-11	Northern Ontario Grants to Lakehead and Laurentian Universities, 1975-76	Accepted
74-12	Northern Ontario Grants to Algoma, Hearst and Nipissing	Accepted
	(Advisory Memorandum 74-IV)	
74-13	BIU Value to Enable Government to Meet the Cost of its Enunciated Objectives with Respect to University Support in 1975-76	Not Accepted
74-14	Study of Administration Processes in the University Capital Support Program	Accepted
74-15	Study of Specific Government Objectives in Providing Capital Assistance to the University System	Accepted
74-16	Level of Support for Cyclic Renewal in 1975-76	Accepted

OCUA Recommendations and Government Responses, 1977-78

Recommendations Number	Title	Response
	(Advisory Memorandum 77-I)	
77-1 (76-2) (75-3)	Ontario Graduate Scholarship Program Eligibility	Not accepted
77-2	Foreign Visa Student Eligibility	Partially accepted
77-3	Ontario Graduate Scholarship Stipends, 1978-79	Not accepted
77-4	Institutional Awards to Universities Without Doctoral Programs	Accepted
77-5	Ontario Graduate Scholarships to Persons on Student Visas	Partially accepted
77-6	Number of Ontario Graduate Scholarship Awards in 1978-79	Partially accepted
	(Advisory Memorandum 77-II)	
77-7	Provincial Discipline Committees	Accepted for further discussion
77-8	Provincial Interface Planning Committee	Not accepted
77-9	Eligibility of Preliminary Year Programs for Support Under the Operating Grants Formula	Accepted for further discussion
77-10	Eligibility of Brock Grade XII Entrant Program for Support Under the Operating Grants Formula	Accepted for further discussion
	(Advisory Memorandum 77-III)	
77-11	Funding Level for 1978-79 to Meet the Cost of Basic Objectives in Funding the Operation of Provincially-Assisted Universities, Ryerson, the Ontario Institute for Studies in Education and the Ontario College of Art	Not accepted
77-12	Additional Funding for 1978-79 for the Existing Bilingualism Programs and the Bar Admission Course	Accepted
77-13	Level of Support for Major Renovations, Alterations and Replacement Projects in 1978-79	Not accepted
	(Advisory Memorandum 77-IV)	
77-14	Measure of Comparative Space Needs	Accepted
77-15	Collection of Capital Information	Accepted
77-16	Criteria for Capital Assistance Eligibility for Long-Term Rentals	Accepted
77-17	Criteria for Capital Assistance Eligibility for Short-Term Rentals	Accepted
	(Advisory Memorandum 77-V)	
77-18	Funding for the Mining Engineering and the Mineral Processing Engineering Programs at Laurentian University	Accepted
	(Advisory Memorandum 77-VI)	
77-19	Northern Ontario Grants 1978-79	Accepted
77-20	Bilingualism Grants 1978-79	Accepted
77-21	Supplementary Grants 1978-79	Accepted
77-22	Grant to the Law Society of Upper Canada on Behalf of the Bar Admission Course 1978-79	Accepted
77-23	GFU and BIU Values for 1978-79	Accepted
	(Advisory Memorandum 77-VII)	
77-24	Funding Criteria for New Graduate Programs in the First Quinquennium, 1979-80 through 1983-84	Accepted

What follows is some general comments about OCUA:

(1) The rationale for OCUA could be paralleled to the rationale for creating a superagency for the professions by saying that 'the universities of Ontario, like the professions, are governed by their own legislation and are regarded, and regard themselves, as autonomous institutions'. But the comparison falls apart, of course, on the financial dimension. Unlike the professional organizations, universities are 80% financed by the Ontario government. They are, therefore, in constant need of resource allocations and policy decision-making. The government deemed it in the public interest to make universities broadly aware of the need for accountability. Rather than rely on the Minister and his direct accountability to the Legislature, the Province saw it fit to establish the Ontario Council on University Affairs as the intermediary between the universities on the one hand, and the Executive Council and Legislature on the other. OCUA's predecessor agency was called the Committee on University Affairs. Like the latter, OCUA was designed to observe the classic lines of accountability: it was created only to advise and was given no programme implementation capacity.

(2) The Council was to have been established by legislation, namely An Act to Amend the Ministry of Colleges and Universities Act, 1974. But because of other amendments also included in the bill, it died. The operation of OCUA is guided by its terms of reference which are similar to those that were contained in the bill.

(3) The Council is advisory to the Minister first and foremost. It was

also asked to be advisory to the Lieutenant Governor in Council; this in order to give it more status so that if the Minister was giving Council trouble, OCUA could approach Cabinet.

(4) In fact, Dr. Dupré's letter of appointment as Chairman gave him direct access to the Premier. He used this power three or four times.

(5) To the extent that OCUA is advisory it does so by decreasing the traffic of information which is being funnelled into the Minister's office; it considers this primary information and arranges it into comprehensible analyses and priorities. As long as the Minister follows OCUA's recommendations, he will stand on firm and protected ground. When he deviates from this advice, he is 'fair game' for Opposition attack.

(6) There is a need to maintain the independence and integrity of Council; the writing and publication of the textual memoranda acts as a safeguard in this respect. The textual memoranda are first sent to the Minister for consideration. If the Minister does not indicate his response to the recommendations soon (e.g. "accepted", "accepted for further discussion", etc.) then he will know that the memo will appear for public and political debate in the OCUA's Annual Report. The Minister corresponds his decisions by letter to the Chairman. The memos are sent to the universities after they are sent to the Minister but before publication.

(6) As has been stated, some OCUA advice is regarding spending allocation while other recommendations concern broader regulatory issues. The OCUA's recommendations on the former have been accepted 100% by the Minister; the latter have not.

(7) In any large group such as the twenty-member OCUA, there will always be the non-participants on the one hand and the non-contributors on the other. Given the care with which all appointments are made, one probably couldn't distinguish in this between those members from university life and those from other fields. The latter, as Dr. Winegard has explained, bring their own special expertise to the OCUA boardroom. What remains for them is to gain familiarity with the particulars of the new subject area. Some do this better than others.

(8) The first appointments to the Council were a showcase (Deutsch, Gerstein, Mustard, Ronald Ritchie, etc.) and this no doubt immediately set the status of the Council at a prestigious level. It is difficult to maintain that high a quality of appointments because of the large number of other bodies requiring multiple appointments every year.

(9) The Council meets for about thirty days each year, mostly on Fridays and Saturdays.

(10) The letter from the Chairman to the universities and four other institutions setting out Council's objectives for the year really sets the stage for that period. The organizations are given a few months to prepare their briefs. When briefs are received at the OCUA offices,

they are first analysed by the staff and then the brief and a staff memo are reviewed by Council. Hearings are held between March and June every year. At these hearings it is customary for the President/Chairman of the institution to make an opening statement. After this, the OCUA members ask questions to the organization's delegation. The briefs and hearings constitute only one source of input to the OCUA policy recommendations. The research officers undertake research projects at the initiation of the Chairman as well.

(11) The chairmanship is a full-time appointment at OCUA while members receive a per diem honorarium plus travel expenses. The honorarium theoretically equalizes the opportunities for accepting government appointments.

(12) The annual budget is $175,000.

* * *

In the Ontario Council on University Affairs we see a model of advisory committees at their best. With no implementation power, it is very far from lacking "political marbles." Indeed, OCUA protects the government's flanks by providing it with well-researched and reasoned policy advice on an ongoing basis. Its efficacy is measured by the extent to which the recommendations in its textual memoranda have been accepted. The government virtually relies on OCUA for its allocative, and for many of its policy, decisions vis-a-vis universities and allied institutions in the province.

Herein lies the key to the success of OCUA:

(1) its responsibilities require ongoing decision-making

on issues that are often at the political forefront;

(2) its responsibilities include making allocative recommendations on $1 billion of public funds annually. Last year these resources constituted 10% of the provincial tax dollar;

(3) besides spending decisions, OCUA is faced with the host of policy dilemmas which are facing universities in this decade of their discontent;

(4) such responsibilities mean that there is a constant flow of information into the Ministry of Colleges and Universities which needs to be rationalized;

(5) while Ministry officials and affected interests attempt to influence policy decisions directly in this area, OCUA has become prestigious and successful enough to be considered the premier source of policy in its category.

In assessing the possibility of an advisory body for the professions against these criteria one wonders about its viability.

(1) the scant flow of regulations emanating from our four professions would make exclusive ongoing review unnecessary, even if we were stricter about what need be put in the form of regulations. Ongoing review of annual reports or of complaints might create enough work for an advisory body but we should ask ourselves how interesting this work would be. Moreover, whereas university affairs reap problems that gain instant political momentum (because of their spending and cultural implications), the operation of the professions might not be quite as salient. An

advisory body might be faced with giving advice to which everybody shrugs "So what?";

(2) This would be the result of (a) the interest in the work of a council which only reviewed regulations and reports or heard appeals on discipline cases, and (b) the lack of financial implications of the professional organizations on the public treasury. I would have reservations about allowing an advisory body to review the secondary legislation of the government. If it, and not the appropriate legislative committee, were to conduct this review, I would consider it to be an abrogation of legislative responsibility. If both bodies were to conduct the reviews, I would consider it to be overkill.

Leaving the issue of legislative review aside, an advisory body on the professions could, of course, move into the policy advising business as well. It could give ongoing advice, for example, on the demarcation lines between professionals and paraprofessionals. However, perhaps one ought to be concerned if this type of review were to be done more than every ten years because career counselling depends on the division of functions in the professions. Such careers could not stand the fluid and evolutionary nature that is central to recommendations of advisory bodies;

(3) Again one wonders about the amounts of information inputs which would require an ongoing advisory capacity vis-a-vis the professions;

(4) One doubts the officials at the Ministry of the Attorney General would become quite so involved in professions policy as MCU bureaucrats do in relation to OCUA recommendations. This is perhaps because of the programme and fiscal implications in the latter arena that are absent in the former case. One could, of course, predict an active and ubiquitous presence by the professions should an advisory body be installed.

* * *

The Ontario Advisory Council on Occupational Health and Occupational Safety

In this case, we see an advisory body at the beginning of its life. The Council was formed on May 23, 1977. Its Order-in-Council set out the following powers and functions:

(1) to make recommendations to the Minister relating to programmes of the Ministry in occupational health and occupational safety; and

(2) to advise the Minister on matters relating to occupational health and occupational safety which may be brought to its attention or be referred to it.

The Council also may be required "to submit an Annual Report to the Minister which must be tabled in the House as a public document. This Annual Report will contain all the advisory memoranda and recommendations made to the Minister and the Government of Ontario and will, therefore, serve as a report on Council's activities during the period covered."[10]

Council sought ministerial approval for the following objectives and terms of reference:[11]

Primary Objective

To advise the Minister of Labour on all matters relative to occupational health and safety in Ontario.

Secondary Objectives

(1) To ensure as far as is possible that the policies and programmes in occupational health and safety effectively minimize the risks to health and safety in all workplaces in Ontario.

(2) To ensure as far as is possible that knowledge about occupational health and safety is available to management, labour and the public and that it is understood by them.

(3) To assist in promoting and establishing mechanisms involving management and labour to solve problems in occupational health and safety.

(4) To ensure as far as is possible that there is appropriate manpower training and development for the occupational health and safety field.

Terms of Reference

(1) To make recommendations on matters referred to it by the Minister, submitted to it by interested parties or pursued by Council on its own initiative.

(2) To advise the Minister on programmes in the field of occupational health and safety.

(3) To advise the Minister on policies, principles and procedures used in standard setting and in the development of guidelines to be used by the government.

(4) To review and make recommendations to the Minister on the introduction of new substances such as chemicals into the workplace.

(5) To review and make recommendations on the detection, measurement and control of occupational health and safety hazards in the workplace.

(6) To review and make recommendations about the arrangements for occupational health and safety for groups and areas where there are no formal health and safety programmes or the programmes are judged to be inadequate.

(7) To advise the Minister on priorities for research and development in occupational health and safety.

(8) To advise the Minister on priorities for manpower training and development in the field of occupational health and safety.

(9) To prepare an Annual Report to the Minister, which shall include the advisory memoranda, recommendations of the Council and the government response.

Council has from twelve to twenty members on it. It replaces both the old Labour Safety Council and the Advisory Council on Occupational and Environmental Health. Its membership, as will be discussed below, is

drawn equally from labour, management and the public at-large. In preparation of its Interim Statement, Council's first report, it met four times between November 28, 1977 and March 31, 1978.

If the requirements for publication of advisory memoranda sound familiar, it is because the OCUA has served very much as a model for this new Council of the Ministry of Labour. Not surprising as well is the fact that Dr. Fraser Mustard, who has been a member of OCUA[12] from its inception, was asked by the (then) Labour Minister, Dr. Bette Stephenson, to take on the position of first Chairman. She had worked with Dr. Mustard on the Health Planning Task Force, which had given rise to another advisory body in Ontario, namely the District Health Council.

Dr. Mustard has taken a strong leadership role in this first year of Council's life. He has set the tone for the role of Council by stipulating from the outset to the Minister that it should not be responsible for setting the standards or regulatory guidelines for occupational health and safety. Rather, it should provide advice regarding the appropriateness of the principles, policies and procedures used in setting the standards, regulations, guidelines and codes of practice in occupational health and safety in Ontario. Council also should review and comment to the Minister on the appropriateness of the procedures which are used by the Ministry, including the issue of public input into the final guidelines and regulations.

Council intends to look at the effectiveness of various approaches to monitoring and maintaining occupational health and safety standards in the workplace. Toward that end, Council intends to embark on basic fact-gathering research. It will, among other things, gather information from programmes and studies across Ontario and the world, and later apply this knowledge by testing new approaches to the problem at hand.

The Advisory Council on Occupational Health and Safety uses the task force approach to the variety of issues facing it. These task forces are composed of members of Council as well as members of the community who are recruited on an ad hoc basis for their particular expertise to help these subgroups to prepare the advisory memoranda for consideration by Council. As of March, 1978, the Council had the task forces for the following:

(1) Public Meetings of Council;

(2) Principles and Procedures for setting Standards and Regulations;

(3) Procedures for Monitoring and Maintaining Occupational Health and Safety Standards in the Workplace;

(4) Occupational Health and Safety in Places without Formal Programmes;

(5) Occupational Health and Safety Manpower Needs, Education Programmes and Occupational Health and Safety Information;

(6) Occupational Health and Safety Research;

(7) Potential New Hazards.

If Council accepts a memo prepared by one of its task forces, it then goes to the Minister. It is important to note that some advisory memos are circulated by Council to affected interests for comment at public hearings before they are sent to the Minister.

The Council's Interim Statement stresses that it should be regarded as a public advisory body. Its members represent broad segments of concern rather than particular institutions. Its advice and the Minister's responses to that advice will be fully public in its Annual Reports. It will look at areas of concern to its Minister, its members and its public (although the avenue for facilitating the latter is not suggested).

Council feels that it is the role of the Minister to draft the health and safety regulations and to measure their political consequences. However, it does recommend that interested groups be informed of the Minister's intentions to develop regulations, in a particular area, that these groups be allowed to contribute to the debate, that their inputs be made public on request and that the regulations be revised after the hearings if necessary. All regulations should carry appendices listing the briefs and other references used in the formulation of the regulations.

Beyond this information derived from the Interim Statement of Council there was no more substantial material about this new advisory body. I therefore contacted Mr. A. Byrne and Mr. A. Gladstone who are on staff at the Council and discussed with them at some length the new Advisory Council on Occupational Health and Safety. Mr. Byrne is its Executive Secretary; Mr. Gladstone, the Executive Assistant to the Chairman. The following is a summary of that discussion:

(1) The Council was set up to give advice to the Minister on this vital - and currently very visible - area of public policy. The Chairman of Council gives this advice to the Minister in the form of textual memoranda after receiving the consent of Council.

(2) The Council is currently set up by an Order-in-Council, but it will eventually be constituted under Bill 70 - The Occupational Health and Occupational Safety Act - once it is commandeered through the Legislature. Whereas members currently are appointed by the Minister, they will then be appointed by Cabinet Order-in-Council.

(3) The current Council is an amalgam of certain elements of two former advisory bodies: the Occupational Health and Environmental Health Council, and the Labour Safety Council. In March, 1977, an arrangement was made between the Ministries of Health and Labour to co-ordinate the Health-related aspects of the two bodies under the Ministry of Labour.

The Environmental aspect was left behind. The union was completed in the summer of 1977. In September of that year the Chairman was named. By November, the membership list had been drawn and the first meeting was held.

(4) In casting the membership for this Council, the Minister had in mind the following split among the twenty participants:

Labour	6
Management	6
Public at large	6
Chairman	1
Vice Chairman	1
	20

Industry, management and trade were solicited to contribute to a list of nominees. While Dr. Stephenson did use this list, she also drew from the new Council's predecessor advisory boards for members. The public at-large sector in this case was drawn from such areas as academia and the clergy. There was no great effort to satisfy concerns for geographical representation, although there is some de facto distribution on this basis. Rather, people were chosen for the contribution they could make.

It seems quite clear that Dr. Mustard is moulding this new Council after OCUA: one of his first actions as Chairman was to get the Minister's approval for the tabling of an Annual Report of Council in the House. Dr. Stephenson assured him of this and she made an amendment to Bill 70 in order to confirm it in the pending legislation.

(5) The Chairman's appointment is now on a part-time basis, at the rate of $200 per diem. The Chairman would like this to be a full-time job like that of the OCUA Chairman. Like most advisory councils, this Council depends on its Chairman for its success. In the case of Fraser Mustard, he has both the respect and the ear of Council.

(6) Members are paid $100 per diem (plus expenses). Also like most advisory bodies, the Ontario Advisory Council on Occupational Health and Safety has some excellent members and some dead weight. This makes the Chairman's job of assigning participation on task forces all the more difficult: he must be mindful of the labour/management resources at his disposal and must create an effective mix vis-a-vis the suitability of expertise. The Chairman, not the Minister, named the task force subjects based on Council's terms of reference. Council met about ten out of twelve months last year. The task forces met no more than twice a month.

(7) Each member sits on two task forces. These task forces are fairly informal in format, but they show a determined will in their work. They know that if Council is to be a vibrant centre for policy advice it must generate its own subjects for advice. It cannot wait for the Minister to dictate these because his actions are structured by the legislative flow. Advisory councils must help create that flow rather than just being reactive to it. It is interesting to note that on one occasion thus far the Minister has wanted the Council to examine an issue of specific substance. Dr. Mustard soon replied that the Ministry, and not the Council, had the resident experts to deal with the problem. So much for the staff-line jealousies that can so easily occur!

(8) The Council's proposal of selecting appropriate experts on an ad hoc basis to serve on task forces has been used. An amendment to the Order-in-Council setting out the advisory body now allows for special appointments to task forces, based also on $100 per day. For example, an industrial hygienist was chosen to work on the "Monitoring and Maintaining Standards" Task Force. A nurse who was head of the Nursing Registry is serving on the new Task Force on Small Business, and another nurse was recruited for the Task Force on Manpower Planning, Education and Training. Dr. Mustard believes that technical experts should be working on the task forces, leaving the generalists to sit on Council.

The Task Force on Research is examining current and past projects of the province and across the world, with a view

to co-ordinating efforts and developing criteria for government spending on research in the area of occupational health and safety. Toward the goal of rationalizing efforts, the Council has seconded someone from the Council of Health to help flag the areas of overlap. While Dr. Mustard initiated the first set of task forces of Council, staff and Council members are now generating their own ideas.

(9) The staff of the Council is composed of the executive secretary, executive assistant to the Minister, one research officer and two secretaries. The operating budget is under $300,000 per year.

(10) The executive assistant writes up reports of the task forces of Council, whereas on the old Occupational and Environmental Health Council, the Standing Committees wrote up their own reports. In fact, Byrne and Gladstone seem to have a large role, at least in this first year of Council's life. They attend all meetings and provide an agenda for each. They guide the less experienced members and, although they do not vote in the decisions of task forces, they occasionally give advice on Ministry policy or on the activities of some task forces which impinge on the decisions of another task force.

(11) Council seems to be resisting Dr. Mustard's desire to hold public meetings. The only meetings held to date have been with major associations just to get a feel for what these groups do and whether Council might be able to advise the Minister on them. Such groups as the Workmen's Compensation

Board, the Construction Safety Association and the Industrial Accident Prevention Association have met the Council thus far.

(12) Messrs. Byrne and Gladstone feel, quite rightly, that it is too early to assess the efficacy of Council. There has been a recent change in Minister, and the staff of the Minister's office have also departed.

Mr. Byrne suggested though that the Council has not received quite the response it had hoped for, but he expects this will change. To date, Council has submitted three memos:

(a) a memo on federal-provincial jurisdiction in the area of occupational health and safety. A response from the Minister indicated that action was now under way;

(b) a memo on standard setting. Due to turnover in staff in the Minister's office, the first response to this letter was unsatisfactory and uninformed. Another response is in the works. The Ministry has tabled in the Gazette, seven standards for public comment. Council did not have a hand in this;

(c) a third memo on manpower planning. No response has been received at the time of my interview.

(13) When advisory memos are received by the Minister, both his staff and appropriate Ministry staff review it. The Minister may choose to make the memo public immediately, if he deems it politically advantageous to inform the public by soliciting response.

(14) The Annual Reports will contain the advisory memoranda and the responses of the Minister, or the lack thereof. Council also hopes to provide an overview - an evaluation - of its own strengths and weaknesses over the years. The Chairman and/or staff will prepare the draft report for consideration by Council. The textual memoranda are often done in this way as well. While all memos must be approved by Council, the Annual Reports will include minority reports if necessary.

(15) Staff must be named staff of the Council, rather than of the Ministry, and must be accountable only to the latter.

(16) The effort under way to turn the chairmanship of the Council into a permanent position would also mean that the Chairman would be at the Deputy Minister level. This would effectively remove Council's budget from the office of the Assistant Deputy Minister for Occupational Health and into a vote item of its own. While this change would clear the way for a total and direct line of access to the Minister, it might also leave the budgetary implications of this Council undesirably unchecked.

In both advisory bodies described above, the personalities and institutional guarantees involved ensure that they present formidable forces in their respective policy areas. Concomitant to this is the fact that the Ministers and government have strong commitments to the issues of university affairs and occupational health and safety - and to the expenditures thereof. There is, in these policy areas, a sense of their urgency in the public policy fabric; moreover, there is a need for ongoing policy advice and/or resource allocation in both fields. One senses that professions policy does not fit into this mould.

Still, if we were to suggest an advisory body for the professions, it would have to:

(1) be located at the centre of a ministry. While the Attorney General has been the residence of professional legislation in our four areas to date, if such an advisory body is meant to include all professions in Ontario, this would not be the appropriate place for the body. Depending on the scope of its function, one might argue in favour of Consumer and Commercial Relations; alternatively, because of the discrepancies this would create between the "ministry for purview" and the "ministry for overview," one might think of making this a central advisory agency to the government. In that case it would report to the Premier rather than to a minister;

(2) draw members, I would suggest, from:

- academia
- professions
- government
- public at-large

(3) be given functions that are interesting.

This would demand that the professions advisory council be given responsibility for some of the overview tasks that Aucoin considers important as well as the examination of continuing competence issues which Reiter writes about in his disussion of a Professions Office.[14] While I would have thought that the mechanisms for reviewing regulations are already in their proper place (although the previous section indicated the problems and ways of improving those mechanisms), an advisory council for the professions could have the capacity for ex poste review of regulations;

(4) be required to file an Annual Report to the Minister (or Premier); this report to be tabled in the House. The report would include all textual advisory memoranda and the responses to them. This would be a fully public document;

(5) be allowed to recruit experts in technical areas to sit on task forces on an ad hoc basis. The subjects of investigation of these task forces could be initiated by Council, or by reference from the Minister, the Legislature, or even from the public at-large;

(6) be given a confident and competent first Chairman; one with a clear idea of the problems already existent in his new territory and with an innovative mind to face the future. He should be joined by an open-minded membership, who need not know the field but who are willing to apply the skills that made them attractive candidates to a new milieu of problems.

FOOTNOTES

1. Ontario Management Policy Division of Management Board Secretariat, "Agencies, Boards and Commissions in the Government of Ontario," June, 1974, p. 54.

2. Richard J. Van Loon and Michael S. Whittington, The Canadian Political System: Environment, Structure and Process. (Toronto: McGraw Hill Co. of Canada, Ltd., 1971) p. 312.

3. G.B. Doern, "The Role of Central Advisory Councils: The Science Council of Canada" in Doern and Aucoin (ed), The Structures of Policy-Making in Canada (Toronto: The Macmillan Co. of Canada, Ltd., 1971) p. 260.

4. Ibid., p. 260.

5. T.K. Shoyama, "Advisory Committees in Administration" in J.E. Hodgetts and D.C. Corbett (eds.), Canadian Public Administration. Quoted from Allan Halladay and Brian Wharf, The Role of Advisory Council in Forming Social Policies: A Case Study of the National Council of Welfare (Hamilton: McMaster University, 1974).

6. Francis Bregha, Public Participation in Planning, Policy and Programmes in Halladay and Wharf, op. cit., p.19.

7. The institutions that currently comprise Council's terms of reference are the fifteen provincially-assisted universities (Brock, Carleton, Guelph, Lakehead, Laurentian, McMaster, Ottawa, Queen's, Toronto, Trent, Waterloo, Western Ontario, Wilfrid Laurier, Windsor, York and their federated and affiliated institutions); the Ontario College of Art; the Ontario Institute for Studies in Education; Ryerson Polytechnical Institute; and the Bar Admission Course of the Law Society of Upper Canada.
See Ontario Council on University Affairs, First Annual Report, 1974-75, p.4.

8. I thank Dr. William Winegard for his explanation to me of the representation issue.

9. Ontario Council on University Affairs, First Annual Report, 1974-75, p.4.

10. Ibid., p.5.

11. Ontario Ministry of Labour, Advisory Council on Occupational Health and Occupational Safety. Interim Statement, November 1977 to March 1978, p.5-6.

12. Ibid., p.6-7.

13. Mr. Peter Riggin is also a member of both Councils.

14. See Barry J. Reiter, Discipline as a Means of Assuring Continuing Competence in the Professions, Working Paper #11 prepared for the Professional Organizations Committee, 1978, Part H.